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1

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

WATTS, WATTS & COMPANY, LIMITED,
Libelant,

AGAINST

UNIONE AUSTRIACA DI NAVIGACION,
ETC.,
Respondent.

2

STATEMENT.

1914

Aug. 24. Libel filed.

Sept. 8. Affidavit and Notice to open De- 3
fault filed.

“ 16. Answer filed.

“ 17. Order opening Default entered.

1915

Mar. 29. Trial before Veeder, J.

May 21. Opinion filed.

“ 27. Final Decree entered.

“ 27. Notice of Appeal filed.

“ 28. Assignments of Error filed.

4

TO THE JUDGES of the United States District Court
for the Eastern District of New York:

The libel of Watts, Watts & Company, Limited,
against Unione Austriaca di Navigacion, in a
cause of contract, civil and maritime, alleges:

FIRST: The libelant, Watts, Watts & Company,
Limited, is a corporation organized and existing
6 under the laws of Great Britain and Ireland,
with agents in London, New York and other ports,
and is engaged, among other things, in the busi-
ness of furnishing coal to steamships. The re-
spondent, Unione Austriaca di Navigacion, is a
corporation organized under the laws of the Em-
pire of Austria-Hungary, and is the owner of a
large number of steamships which, prior to the
outbreak of the present war, were engaged in
7 navigation to and from New York and other ports
and places.

SECOND: On or about November 19, 1913, a con-
tract in writing was entered into between the li-
belant and the respondent for the furnishing by
the libelant of bunker coal to the steamers of the
respondent on agreed terms and conditions.

THIRD: Prior to the date of the filing of this
8 libel, the libelant, at the instance and request of
the respondent, furnished to the steamers of the
respondent, in accordance with the provisions of
said contract, bunker coals of the reasonable and
agreed value of £9,000, equivalent in currency of
the United States at the current rate of exchange
of \$5.04 to \$45,360.00, for which respondent has
not made payment to the libelant as provided for
in the said contract although the said amount is

now due. Demand has been made for payment in respect of the said coals, but no part of the said indebtedness has been discharged.

FOURTH: The respondent, Unione Austriaca di Navigacion, is a foreign corporation, and, as libelant is informed and believes, none of its officers or directors resides or is within this district. Said respondent, however, has certain property within the district, to wit, the Austrian steamship *Martha Washington*, her engines, boilers, tackle, apparel and furniture, of which the respondent, Unione Austriaca di Navigacion, is sole owner. 10

FIFTH: All and singular the premises of this libel are true and within the admiralty and maritime jurisdiction of this Honorable Court. 11

WHEREFORE, the libelant prays that process may issue, with clause of foreign attachment, against respondent, Unione Austriaca di Navigacion, citing it to appear and answer in the premises, and further commanding the Marshal of this district, in case the said respondent cannot be found within the district, that property of the respondent within this jurisdiction, consisting of the steamship *Martha Washington*, be attached, and that a decree may be entered herein in favor of the libelant against the respondent for the sum of \$45,360.00, with interest and costs, or that the Court will grant to the libelant such other or further relief as the justice of the cause may require. 12

CONVERS & KIRLIN,
Proctors for Libelant.

13

Libel.

STATE OF NEW YORK, }
 County of New York, } ss.:

JOHN M. WOOLSEY, being duly sworn, says: I am a member of the firm of Convers & Kirlin, proctors for the libelant herein. That the foregoing libel is true of my own knowledge, except as to the matters stated to be alleged on information and belief, and as to those matters I believe it to be true.

14

The sources of my information and the reasons for my belief as to the matters not within my own knowledge are correspondence had with the representatives of the libelant.

The reason this verification is not made by the libelant is that it is a foreign corporation, and the reason that it is not made by one of its officers is that none of them is within the United States.

15

JOHN M. WOOLSEY.

Sworn to before me this)
 25th day of August, 1914.)

L. DE GROVE POTTER,
 Notary Public,
 Westchester County.

Certificate Filed in
 New York County, No.
 Register Number

16

To the Honorable THE JUDGES of the District Court of the United States for the Eastern District of New York:

The Answer of the Unione Austriaca di Navigation, to the libel of Watts, Watts & Company, Ltd., in a cause of contract, civil and maritime, alleges as follows:

FIRST: The respondent has no sufficient knowledge that the libelant is a corporation organized and existing under the Laws of Great Britain and Ireland, with agents in London, New York and other Ports, or that as such it is engaged, among other things, in the business of furnishing coal to steamships, and leaves the libelant to its proof therefor. 18

The respondent admits that the Unione Austriaca di Navigation is a corporation organized under the laws of the Empire of Austria, Hungary, and is the owner of a large number of steamships, which prior to the outbreak of the present war were engaged in navigation to and from New York and from other ports and places. 19

SECOND: Respondent admits that on or about November 19th, 1903, a contract in writing was entered into between libelant and the respondent for the furnishing by the libelant of bunker coal to steamships of the respondent on agreed terms and conditions, but as to the terms and conditions therein contained the respondent makes reference to the said contract and leaves libelant to prove the same. 20

THIRD: Respondent has no knowledge, sufficient to form a belief, that prior to the date of the

21

Answer.

22 filing of the said libel, the libelant furnished to the steamers of the respondent, in accordance with the provisions of said contract, bunker coal at the agreed price and reasonable value of £9,000, equivalent in currency of the United States at the current rate of exchange of \$5.04 to \$45,360.00, and respondent leaves the libelant to make proof sustaining the said allegation contained in the "Third" paragraph of its said libel.

Respondent further answering, denies that payment to the libelant as provided for in said contract was demanded of the respondent, and that the respondent thereupon refused to make payment of the sums so due as provided for in the said contract.

23 **FOURTH:** Respondent admits that Unione Austriaca di Navigation, is a foreign corporation and none of its officers or directors reside or is now within this district but as to whether the allegations made in the "Fourth" paragraph of said libel, the respondent leaves libelant to his proofs to sustain the same.

24 **FIFTH:** Respondent admits that all singular the premises of this libel are within the Admiralty and maritime jurisdiction of this honorable Court.

WHEREFORE, respondent prays that judgment be rendered in the premises in accordance with the allegations and proofs which shall be submitted by libelant, and in default thereof that the libel be dismissed with costs.

LORENZO ULLO,
Proctor for Respondent.

Answer.

25

STATE OF NEW YORK }
 City of New York } ss.:
 County of New York }

LORENZO ULLO, being duly sworn says: I am the proctor for the respondents herein. I have read the foregoing answer and know the contents thereof, and the same is true to the best of my knowledge, information and belief. The sources of my 26 knowledge and information are communications received from the attorneys of the respondent. The reason why this verification is not made by the respondent is that the respondent is a foreign corporation.

LORENZO ULLO.

Sworn to before me this}
 11th day of September, 1914.}

JAMES A. BEHA,
 Notary Public.

27

[L. S.] New York County.

28

20 UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

WATTS, WATTS & COMPANY, LTD.,
Libelant,

AGAINST

30 UNIONE AUSTRIACA DI NAVIGAZIONE
Respondent.

Stipulation as to
Facts and Proof
of Foreign Law.

IT IS STIPULATED AND AGREED by and between the proctors for the respective parties that the facts in the above case are as follows:

31 1. The libelant, Watts, Watts & Company, Limited, is a corporation organized and existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, with its principal offices in the City of London.

32 2. The Unione Austriaca di Navigazione, whose full title is, "Unione Austriaca di Navigazione gia Austro-Americana e Fratelli Cosulich-Societa Anonima," is a corporation existing under and by virtue of the laws of the Austro-Hungarian Empire, with its principal offices at Trieste, and owns and operates a large fleet of steamers in the Mediterranean and Transatlantic Trades.

3. Messrs. Fratelli Cosulich are the managing directors of the said Unione Austriaca di Navigazione and, as such, duly authorized to make contracts for the said company and to acknowledge the indebtedness thereof.

Stipulation as to Facts and Proof of Foreign Law. 33

4. On or about November 19th, 1913, a contract in writing was entered into by and between the respondent acting through Messrs. Fratelli Cosulich of Trieste, who are subjects of the Austro-Hungarian Empire, and Watts, Watts & Company, Ltd., the libellant herein. A copy of this contract as signed and executed is hereto annexed marked Exhibit 1, and hereby made part of this stipulation. 34

5. Coal was furnished at Algiers to the following steamers of the respondent by Messrs. Watts, Watts, & Company, Ltd., under and in pursuance of the said contract as follows:

Date	Steamship	No. of Tons	Amount	
1914				
May 29:	Martha Washington,	606	734:15:6	
June 1:	Kaiser Franz Josef I,	781	946:19:3	
June 3:	Anna,	112	135: 6:0	35
June 5:	Oceania,	572	620:16:0	
June 9:	The Gerty,	192	232:16:0	
June 15:	Argentina,	290	351:12:6	
June 18:	Kaiser Franz Josef I,	992	1202:16:0	
" 23:	Campania,	140	169:15:0	
June 26:	Belvedere,	399	423: 3:3	
" 28:	Martha Washington,		972: 8:6	
July 3:	Argentina,	478	579:11:6	
" 6:	Oceania,	463	561: 7:9	
" 13:	Kaiser Franz Josef I,	803	973:12:9	
" 23:	Martha Washington,	607	735:19:9	
			£8641: 9:9	

6. In consequence of the coal so furnished to said steamers, and in pursuance of the said contract, the captains of the several steamers drew drafts in Sterling on the owners of said steamers at sixty days' sight, payable in London, England, for the price of the said coal. 36

The drafts were duly accepted by the owners of said steamers as payable at Kais. Koen. Priv. Oesterreichische Laenderbank, in London, a bank duly

37 *Stipulation as to Facts and Proof of Foreign Law.*

established and doing business in London, England, and thereafter libelant caused them to be duly presented for payment there but for reasons hereafter stated, they were not paid by the said Kais. Koen. Priv. Oesterreichische Laenderbank on the days when they were due and thereupon they were duly protested and are still unpaid.

38 The dates of these drafts, the names of the steamers for whose bunkers they were drawn, their due dates and amounts which have been paid by the libelant for the protest of the drafts are as follows:

Drawn	Vessel	Due	Amount	Expense Protest
1914				
May 29	Martha Washington	Aug. 7/14	£734:15:6	11.6
June 1	Kaiser Franz Josef I	" 11/14	946:19:3	11.6
" 3	Anna	" 11/14	135:16:0	9.0
" 5	Oceania	" 17/14	620:16:0	14.0
39 " 9	Gerty	" 18/14	232:16:0	9.0
" 15	Argentina	" 22/14	351:12:6	11.0
" 18	Kaiser Franz Josef I	" 27/14	1202:16:0	14.0
" 23	Campania	Sept. 1/14	169:15:0	11.6
" 26	Belvedere	" 4/14	423: 3:3	11.6
" 28	Martha Washington	" 4/14	972: 8:6	14.0
July 3	Argentina	" 12/14	579:11:6	14.0
" 6	Oceania	" 12/14	561: 7:9	14.0
" 13	Kaiser Franz Josef I	" 22/14	973:12:9	14.0
" 23	Martha Washington	Oct. 1/14	735:19:9	11.8
			8641: 9:9	£8 3.6
				8641 9.9
			8649:13.3	

40

Copies of the original drafts with protests are hereto marked Exhibits 2 to 15, inclusive, and are hereby made part of this stipulation.

7. On August 4th, at 11 p. m., Great Britain declared war against Germany, and on August 12, 1914, Great Britain declared that a state of war had existed between Great Britain and the Austro-Hungarian Empire as from midnight.

Stipulation as to Facts and Proof of Foreign Law. 41

8. After these declarations of war proclamations were issued by the King of Great Britain and Ireland in Council on August 5th, August 12th and on September 9th, 1914, as to trading with the enemy. A copy of such proclamations is hereto annexed and are hereby made part of this stipulation, as Exhibits 17, 18, 19 hereof.

The British Parliament also passed an act entitled "Trading with the Enemy Act, 1914," copy of which is hereto annexed, marked Exhibit 20. 42

9. The Kais. Koen. Priv. Oesterreichische is a banking institution organized under the laws of Austria, which at the outbreak of war had a duly-established branch, established and doing business in London. After the outbreak of war and as a war measure and on or about August 13, 1914, Sir Willam Plender, the person referred to in certain of the protests attached to the drafts, was appointed Comptroller of the London branch of said bank in pursuance of Section 3 of the Trading with the Enemy Act. The following is an extract from London Daily Telegraph, Sept. 30, 1914, showing the circumstances of his appointment: 43

GERMAN AND AUSTRIAN BANKS

(London Telegraph, Sept. 30, 1914.) 44

AMENDED LICENSES

The Deutsche Bank, the Dresdner Bank, the Direction der Disconto-Gessellschaft, the Austrian Laender Bank, and the Anglo-Austrian Bank, announce that they have received from the British government an amended license, of which the following is a copy:

In pursuance of the powers conferred in me

45 *Stipulation as to Facts and Proof of Foreign Law.*

by the Aliens' Restriction (No. 2) Order in council, 1914, made on the 10th day of August, under the Aliens' Restriction Act, 1914, I hereby permit the Deutsche Bank, the Dresdner Bank, the Disconto-Gessellschaft, the Austrian Laender Bank and the Anglo Austrian Bank, to carry on banking business in the United Kingdom, subject to the following limitations, conditions, 46 supervisions, and requirements, as to the deposit of money and securities:

1.—The permission shall extend only to the completion of the transactions of a banking character entered into before the 5th day of August, 1914, so far as those transactions would, in ordinary course, have been carried out through or with the London establishments.

47 The permission does not extend to any operations for the purpose of making available assets which would ordinarily be collected by or of discharging liabilities, which would ordinarily be discharged by, establishments of the banks other than the London establishments.

No new transaction of any kind, save as may be necessary or desirable for the purpose of the completion of the first mentioned transactions, shall be entered into by or on behalf of 48 the London establishments of the banks.

2.—The business to be transacted under this permission shall be limited to such operations as may be necessary for making the realizable assets of the banks available for meeting their liabilities, and for discharging these liabilities as far as may be practicable.

3. All transactions carried out under this permission shall be subject to the supervision and

Stipulation as to Facts and Proof of Foreign Law. 49

control of a person to be appointed for the purpose by the Treasury, who shall have absolute discretion:

a. To refuse to permit any payment that may appear to him to be contrary to the interest of the nation;

b. To permit any such new transactions as are in his opinion necessary or desirable for the purpose of the completion of the transactions first mentioned in paragraph 1; 50

c. To permit or to refuse to permit the completion of any particular transaction whatsoever.

4. Any assets of the banks which may remain undisturbed after their liabilities have, so far as possible in the circumstances, been discharged, shall be deposited with the Bank of England, 51 to the order of the Treasury.

The permission granted by me on the 10th day of August, 1914, is hereby revoked.

(Signed) R. McKenna.

One of His Majesty's Principal Secretaries of State.

Home Office, Whitehall, September 19th, 1914.

STATEMENT BY SIR W. PLENDER

52

RANGE OF LIABILITIES

Sir William Plender, the Comptroller appointed by the Treasury, has issued the following statement:

On August 10th, 1914, licenses were issued by the Home Secretary to the British establishments of the Deutsche Bank, the Dresdner Bank,

53 *Stipulation as to Facts and Proof of Foreign Law.*

and the Direction der Disconto-Gesellschaft, and on August 13th, 1914, licenses were also issued to the British establishments of the Austrian Laender Bank and the Anglo Austrian Bank, for carrying on banking business in this country, subject to certain restrictions specified in the licenses.

- 54 Owing to the form of such licenses, doubt has arisen as to the range of the liabilities of the British establishments of the banks, and the Home Secretary, as a result, has caused amending licenses to be issued to each of the banks, dated September 19th, 1914, the effect of which is that no liabilities will be recognised by the London branches of the banks except such as in the opinion of the comptroller arise out of transactions which have been entered into by or
- 55 on behalf of these branches.

This excludes also liabilities which originated with or arise out of transactions with the head offices or their branches, which are not liabilities of the London branches.

- The comptroller has absolute discretion to refuse to admit any payment which may appear to him to be contrary to the interest of the Nation; to permit any such new transactions as are in his opinion necessary or desirable for the purpose of the completion of transactions referred to in paragraph 1 of the license; and to permit or to refuse to permit the completion of any particular transaction whatsoever.
- 56

The full text of the license is published, dated, and the business to be transacted under them is limited to such operations as may be necessary for making the realizable assets of the banks available for meeting their liabilities, and

Stipulation as to Facts and Proof of Foreign Law. 57

for discharging its liabilities as far as may be practicable.

DIFFICULTIES IN THE WAY.

The resumption of business, though limited to the completion of transactions entered into before the declaration of war, presents many difficulties.

In some of the banks the assets not collected would appear to be approximately sufficient to meet the liabilities to be discharged under the terms of the amended licenses above referred to.

But immediate payment in full of liabilities which have actually matured, might bear harshly against other creditors whose claims are not yet payable, and the obstacles in collecting money from foreign countries might, and probably would, delay settlement with such other countries. 58

Uniformity in treatment is essential. In the case of certain of the banks there is a shortage between the assets which are available here for collection and the liabilities by reason of the fact that head office is a debtor to London.

This does not imply that creditors may not receive payment in full at a future time, as the head office would, after the declaration of peace, remain answerable for liabilities which were not capable of being discharged out of the assets under the immediate control of the London establishments. 59

DISTRIBUTION ON ACCOUNT UNDER CONSIDERATION.

The question of making a distribution on account (other than to alien) is receiving very serious consideration, and all efforts are being concentrated to secure its accomplishment.

61 *Stipulation as to Facts and Proof of Foreign Law.*

The proportion of assets to liabilities differs in the case of each bank, and distributions when made cannot be on the same scale.

62 The difficulties in securing collections are mainly due to the fact that debts due to the banks from persons and institutions in neutral countries on the continent and in North and South America, are not capable of speedy realization, because of the moratorium which exists in many of these countries, and also on account of the interruptions (now being remedied) in the foreign exchange; securities are not readily marketable, and loans have not been repaid, as the borrowers in many cases plead the moratorium.

63 Holders of cheques issued by customers of the banks and holders of domiciled bills accepted by customers, cannot be regarded as creditors.

64 10. Thereafter the Austrian Emperor on October 18, 1914, and the Joint Ministries of the Austro-Hungarian Empire on October 22nd, 1914, issued certain orders and proclamations, in pursuance of the authority in them duly vested, dealing with "*Measures of Reprisals on Properties and Claims of Hostile States*" and "*Regarding Prohibition of Payments to England and France*" and other cognate matters. Correct translations of these orders and proclamations being Nos. 289, 290, 291 and 292, as published in the "*Bulletin of Imperial Laws for the Kingdom and Lands in the Council of the Empire*" are hereto annexed as Exhibits 21, 22, 23, 24, and hereby made part hereof.

Stipulation as to Facts and Proof of Foreign Law. 65

11. Owing to the aforesaid orders and proclamations of the duly constituted Governments, the said Kais. Koen. Priv. Oesterreichische Laenderbank have not paid to libelant said drafts so accepted as aforesaid, although in the usual course of business the respondent would have provided the said Kais. Koen. Oesterreichische Laenderbank with necessary and sufficient means for the due payment of said drafts on the respective days when due. 66

The respondent addressed a letter under date of September 19, 1914, to Messrs. Watts, Watts & Company, Ltd., the libelant herein, at London, a copy of which is hereto annexed marked Exhibit 25, and is hereby made part hereof.

12. By reason of the proclamations in force within the jurisdiction of the said belligerent Powers hereinbefore referred to and of others which may hereafter be referred to, the above-mentioned drafts amounting to the sum of £8641:9:9, and the above-mentioned sum of £8:3:6, amounting in all to £8649:13:3, with interest thereon from the due dates of the several drafts still remain unpaid notwithstanding that respondent herein has been at all times ready, able and willing to pay the same. 67

13. Either party may read as evidence in the case subject to correction and without formal proof, any Statute, Proclamation or Order in Council of the Lawful Government of the British Empire or of the Austro-Hungarian Empire, or any published Decision of a Court of Record of either of the said Governments. In the case of Proclamations or Orders in Council, the text to 68

69 *Stipulation as to Facts and Proof of Foreign Law.*

be taken as authentic for the Government of the British Empire, shall be the text as officially promulgated in the London Gazette, and for the Austro-Hungarian Empire the text as officially promulgated in the Bulletin of the Imperial Laws.

70 In the case of Statutes of Great Britain, the text to be taken as authentic shall be either that published by the official law reporting association, known as "Published General Statutes," or else those published by the Law Journal known as "Statutes of the Realm."

March 16, 1905.

CONVERS & KIRLIN,
Proctors for Libellant.
LORENZO ULLO,
Proctor for Respondent.

71

72

EXHIBIT 1.

73

Contracts, 1914.

WATTS, WATTS & Co., INC.,

London, Liverpool, Glasgow, Newcastle-on-Tyne,
Blyth, Cardiff and Newport (Mon.)

MEMORANDUM OF AGREEMENT between MESSRS. FRATELLI COSULICH of Trieste, hereinafter called "the Buyers", and WATTS, WATTS & Co., LTD., of Cardiff, hereinafter called "the Sellers".

MESSRS. WATTS, WATTS & Co., LTD., undertake 74
to supply the bunker coal normally required by the Buyers for use of the steamers coaling en route in the customary and usual manner of which they are Registered Managing Owners, the coal not being for account or use of Time Charterers or other parties.

The Buyers on the other part bind themselves to take their entire supplies at such ports from the within-named principals on these terms. 75

Should the general current price for equal quality coal be lower on date of supply, Buyers to have the benefit of such lower price.

Coals are to be supplied in accordance with the custom of the respective ports. Expenses, if any, incurred for Sundays and/or holidays and/or night work and/or coaling in quarantine to be for account of steamer. Export Duty, if any, to be paid by Buyers. Steamer to provide a free side and to give free use of winches, winch- 76
men and tackle when required.

Payment to be in cash at port of delivery or by due acceptance and payment of Captain's Draft in sterling on owners at sixty days' sight, payable in London; and in the event of failure of honour of any draft under this or any other Contract or Contracts for coals and, or necessities, this and any similar Contracts in force

with the sellers as principals or agents shall be subject to cancelment by sellers.

- 78 In the event of the act of God, fire, ice, war, hostilities, pirates, arrest and restraint of princes, rulers and people, insurrection, riots, epidemic, quarantine, perils of the sea, accidents, shortage of railway trucks, obstruction of mines, chutes, rivers, docks, strikes, Lock-outs, stoppage of pitmen or workmen, whether general or partial, and whether on railways, docks or elsewhere, at home or abroad, or other hindrances of any kind whatsoever beyond the control of suppliers, affecting the normal working of this Contract, or should the country in which the place of coaling is situated be engaged in war the suppliers shall during the continuance of such events and until normal conditions again
- 79 prevail be relieved from all obligations under same unless modified by mutual agreement. Should Great Britain be engaged in war with any European or other power this Contract is subject to cancelment by Suppliers.

Port	Price Per Ton	Delivery	Sup- pliers	Con- di- tions	Tele- graphic Ad- dresses
80 ALGIERS	24/3	Best Ad- miralty Coal, F.O. B. & Trim- med, viz:—	Watts Watts & Co. Ltd.		“Watts”
	Large				National, Ferndale, Ocean, Cambrian, Lewis', Dowlais, Hoods &/Or Insoles Merthyr.

Exhibit 1.

81

It is understood that the maximum quantity to be supplied under this contract in any one calendar month, is not to exceed 5,000 tons unless mutually agreed.

This Agreement to be binding for the year 1914.

Dated, 19th November, 1913.

WATTS, WATTS & Co., LTD.,

(s) J. W. Golding.

82

A true copy of the original.

Watts, Watts & Co., Ltd.,

(s) J. W. Golding.

UNIONE AUSTRIACA DI NAVIGAZIONE
gia

AUSTRO-AMERICANA & FRATELLI COSULICH
Societa Anonima

(s) A. Cosulich.

83

84

EXHIBIT 2.

85

£734.15.6

Due 7 Aug.

No. 4885

Algiers, May 29th, 1914

(Stamps)

Watts, Watts
& Co., Ltd.

8636

Watts, Watts
& Co., Ltd.
London.

At sixty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of Seven Hundred and Thirty Four pounds Fifteen shillings and six pence. Value supplied in Cash and necessary disbursements to enable the steamer *Martha Washington* to proceed to New York. To Messrs. Fratelli Cosulich at sixty days after sight. Payable in London.

(Signature illegible)

Master 913

Prot. a/c 11 6 J.E.N. 7 Aug. 1914

(Endorsement on back of draft)

87

Pay The London & Provincial Bank, Ltd.
or order
for WATTS, WATTS & Co. LD.
J. Ralph Williams,

Director

Per Pro
THE LONDON AND PROVINCIAL BANK,
LIMITED,

88

S. H. SIBLEY,
Asst. Accountant

THE LONDON AND PROVINCIAL BANK
LIMITED
LOTHBURY

Remitted for Collection to
London & Provincial Bank, Limited.
CARDIFF DOCKS
TO
H. O.

ON THE Seventh day of August,—One thousand nine Hundred and fourteen,.....at the Request of.....THE LONDON AND PROVINCIAL BANK LIMITED, LONDON..... I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London did exhibit the original aforecopied Bill of Exchange, drawn upon Messrs. Fratelli Cosulich, to a Clerk in the Offices of the Kais. Koer. Priv. Oesterreichische Landerbank in this City, where the said Bill is accepted payable, and demanded Payment thereof, which Demand was not complied with, the said Clerk giving for answer: "Not sufficient cover."..... 90

WHEREFORE, I the said Notary at the Request aforesaid Did and Do by these presents PROTEST as well against the Drawer, Acceptors & Endorsers of the said Bill as all others whom it doth or may concern for Exchange and Reexchange, Costs, Damages and Interest Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the Presence of William John Weeks and Richard Bundy, Witnesses 91

In testimonium Veritatis

11/6

JOHN E. NEWTON

(Stamp) (Seal)

Notary Public. 92

Copy

Due 7 Augt.

£734.15.6

Algiers, May 29th, 1914.

sixty

At thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co. Ltd., the sum of Seven Hundred and thirty Four pounds Fifteen shillings and six pence Value supplied in Coals

93

Exhibit 2.

and necessary disbursements to enable the steamer *Martha Washington* to proceed to New York

To Messrs. Fratelli Cosulich at sixty days after sight

Trieste

Payable in London (Signature illegible)

94 Master

Accepted payable with Messrs.
K. K. Priv. Oester-Laenderbank
in London, Trieste 5th June 1914
Ft. Consulich

Endorsed: Pay the London & Provincial Bank Ltd. or order For Watts, Watts & Co. Ltd. J. Ralph Williams, Director. Per Pro The London and Provincial Bank, Limited S. H. Sibley Asst. Accountant. The London and Provincial Bank, Limited, Lothbury.

95

Remitted for collection to London & Provincial Bank, Limited, Cardiff Docks to H. O.

J. E. N. 7 Aug. 1914

F814 Ex. & P. 385.

Protest ends

(The following slip was annexed to the foregoing draft on its protest)

96 KAIS. KOEN. PRIV. OESTERREICHISCHE LAENDER-BANK, LONDON.

Not sufficient cover.

EXHIBIT 3.

97

£946.19.3

Due 11 Aug. GLYN
Algiers, June 1st, 1914

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of Nine Hundred and Forty six Pounds Nineteen Shillings and Three pence.

Value supplied in Coals and necessary disbursements to enable the steamer *Kaiser Frans Joseph* to proceed to Trieste.

To Messrs. Fratelli Cosulich, x

Trieste,

at sixty days
after sight.

Payable in London.

E. Gerolimice,

Master. (Stamp)

Prot.n/p 11/6 J.E.N. 13 Aug. 1914

99

(Endorsement on back of draft.)

For Watts, Watts & Co., Ltd.

J. Ralph Williams,

Director.

Remitted for Collection by

London & Provincial Bank, Limited,

Cardiff Docks

To

GLYN & Co.

100

101

Exhibit 3.

ON THE Thirteenth day of August, One thousand nine Hundred and fourteen, - - - at the Request of

THE LONDON AND PROVINCIAL BANK LIMITED,
LONDON

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising
102 in London went with the original aforecopied Bill of Exchange to No. 9 Bishopgate, London, E. C., the address of the Kais. Koen. Priv. Oesterreichische Laenderbank, with which Bank the said Bill is accepted payable, in order to demand Payment thereof, but found the premises closed and the following Notice up: "Owing to the state of war, the business of the London Branch of the Laenderbank is necessarily discontinued until its
103 application to His Britannic Majesty's Government for a License to continue business has been granted."

WHEREFORE, I the said Notary at the Request aforesaid Did and Do by these present PROTEST against all whom it doth and may concern for Exchange and Reexchange, Costs, Damages and Interest Suffered and to be Suffered for want of Payment to the said Bill of Exchange. Thus protested at London aforesaid in the Presence of
104 William John Weeks and Richard Bundy, Witnesses

In testimonium veritatis

JOHN E. NEWTON

NOTARY PUBLIC

Protest Non-Payment 11/6

(Stamp) (Seal)

Copy

No. 4887 £946. 19. 3

Algiers, June 1st, 1914.

Sixty.

At Thirty days after sight of this first of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of Nine hundred and forty six pounds nineteen shillings and three pence. Value supplied in coals and necessary disbursements to enable the steamer Kaiser Franz Joseph I to proceed to Trieste. 106

To Messrs. Fratelli Cosulich, X

Trieste. at sixty days after sight.

E. Gerolimice, Master.

Accepted, Payable with Messrs. K.

Payable K. Priv. Oesterr-Laenderbank in
in London. London. Trieste 9th June, 1914. 107

Fratelli Cosulich.

Not Negotiable,

A/c Watts, Watts & Co., Ltd.

London & Provincial Bank, Ltd.

Endorsed: For Watts, Watts & Co., Ltd. Joseph
Williams, Director, Remitted for collection by
London & Provincial Bank Limited, Cardiff
Docks, to Glyn & Co.

J. E. N. 13 Aug. 1914.

Protest ends.

108

(The following slip was annexed to the foregoing draft on its protest.)

KAIS. KOEN. PRIV. OESTERRICHISCHE
LAENDERBANK, LONDON.

INSUFFICIENT FUNDS.

109

EXHIBIT 4.

No. 4888

Due 11 Aug

£135.16.0

Ld.

Algiers, June 3rd, 1914

(Stamp)

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the Sum of One Hundred and Thirty Five Pounds and Sixteen Shillings.

110 (Stamp)

Value supplied in goods and necessary disbursements to enable the steamer *Anna* to proceed to Bona.

To Messrs. Fratelli Cosulich (Stamp)

Trieste

Manlio J. Nicohm,

Payable in London.

Master

G339.

Prot.n/p 9/-J.E.N. 12 Aug. 1914.

111

(Endorsement on back of draft)

For Watts, Watts & Co. Ltd.

J. Ralph Williams,

Director.

Remitted for Collection by
London & Provincial Bank, Limited,
Cardiff Docks

To

GLYN & Co.

112

ON THE thirteenth day of August, One thousand nine Hundred and fourteen, - - - at the Request of

THE LONDON AND PROVINCIAL BANK, LIMITED,
LONDON

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London went with the original aforecopied 114
Bill of Exchange to No. 9 Bishopsgate, London, E. C., the address of the Kais. Koen. Priv. Oesterreichische Laenderbank, with which Bank the said Bill is accepted payable, in order to demand Payment thereof, but found the premises closed and the following Notice up: "Owing to the state of war, the business of the London Branch of the Laenderbank is necessarily discontinued until its application to His Britannic Majesty's Government for a License to continue 115
business has been granted."

WHEREFORE, I the said Notary at the Request aforesaid Did and Do by these presents PROTEST against all whom it doth or may concern for Exchange and Reexchange, Costs, Damages and Interest Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the Presence of William John Weeks and Richard Bundy, 116
Witnesses.

In testimonium veritatis

JOHN E. NEWTON

NOTARY PUBLIC

Protest Non-Payment 9/-
(Stamp) (Seal)

117

Exhibit 4.

Copy

No. 4888 £135.16.0

Algiers, June 3rd, 1914.

xSixty

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of One hundred and thirty-five pounds and sixteen shillings. Value supplied in coals and necessary disbursements to enable the steamer *Anna* to proceed to Bona.

118

To Messrs. Fratelli Cosulich, X

Trieste. At sixty days after sight.

Manlio J. Nicohm, Master.

Accepted, Payable with Messrs. K
 Payable K. Priv. Oesterreichische Laender-
 119 in London bank in London. Trieste, 9th
 June 1914, Fratelli Cosulich.

Not Negotiable,
 A/c Watts, Watts & Co., Ltd.
 London & Provincial Bank, Ltd.

Endorsed: For Watts, Watts & Co., Ltd., Joseph
 Williams, Director. Remitted for collection
 by London & Provincial Bank, Limited, Car-
 diff, to Glyn & Co.

120

J. E. N. 13 Aug. 1914.

Protest ends.

(The following slip was annexed to the fore-
 going draft on its protest)

KAIS. KOEN. PRIV. OESTERRICHISCHE LAENDER-
 BANK, LONDON

 INSUFFICIENT FUNDS.

EXHIBIT 5.

121

Due 17 Aug. GLYN
Algiers, June 5th, 1914

£620 16 0
Sixty days after sight of this First of Ex-
change (second being unpaid) pay to the Order
of Messrs. Watts, Watts & Co., Ltd., the Sum of
Six Hundred and Twenty Pounds and Sixteen
Shillings and No pence.
Value supplied in Bills and necessary disburse-
ments to enable the steamer *Oceania* to proceed
to New York.

To Messrs. Fratelli Cosulich x at sixty days
Trieste. after sight.
Payable in London. (Stamp)

(Signature illegible)

Master.

Prot. n/p 14/- J.E.N. 17 Aug. 1914.

(Endorsement on back of draft)

123

For Watts, Watts & Co., Ltd.

Jno. A. Jones,

Director.

Remitted for Collection by
London & Provincial Bank, Limited,
Cardiff Docks
To
GLYN & Co.

124

ON THE Seventeenth day of August, One thousand nine hundred and fourteen, - - - at the Request of

MESSRS. GLYN & CO. OF LONDON, BANKERS

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London went with the original aforecopied Bill
 126 of Exchange, drawn upon Messrs. Fratelli Cosulich, to No. 9 Bishopsgate, London, E. C., the address of the Kais. Koen. Priv. Oesterreichische Laenderbank, with which Bank the said Bill is accepted payable, in order to demand Payment thereof, but found the premises closed for the day.

On the day following, I again went with the said Bill to No. 9 Bishopsgate aforesaid and there
 127 exhibited to a Clerk in the Offices of the said Kais. Koen. Priv. Oesterreichische Laenderbank, demanded Payment thereof, Which Demand was not complied with and I received for answer: "We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present."

WHEREOF, I the said Notary at the Request aforesaid Did and Do by these presents PROTEST
 128 against all whom it doth or may concern for Exchange and Reexchange, Costs, Damages and Interest Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the Presence of William John Weeks and Richard Bundy, Witnesses.

Protest non-payment 14/-

In testimonium veritatis

(Stamp) (Seal)

JOHN E. NEWTON,

NOTARY PUBLIC

Copy

£620.16.0

Sixty

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of Six Hundred and Twenty Pounds and sixteen shillings. Value supplied in coals and necessary disbursements to enable the steamer *Oceania* to proceed to New York. x at sixty days after sight 130

To Messrs Fratelli Cosulich

Trieste

(Signature illegible)

Master

Payable in London.

Accepted Payable with Messrs. K.
K. Priv. Oesterr-Laenderbank in
London. Trieste 15th June, 1914. 131
Fratelli Cosulich.

Endorsed: For Watts, Watts & Co., Ltd. Jones
Director.

Remitted for collection by the London &
Provincial Bank, Limited, Cardiff Docks to
Glyn & Co.

J. E. H. 17 Aug. 1914.

Protest ends.

132

(The following slip was annexed to the foregoing draft on its protest.)

We are instructed by Sir William Plender, the
Controller appointed by the British Government,
not to make any payments at present.

KAIS. KOEN. PRIVILEGIIRTE OESTERREICHISCHE
LAENDERBANK.

9, Bishopsgate, London.

133

EXHIBIT 6.

No. 4893

Aug. 18
£232:16:0

Due 18 Aug.

Algiers, June 9th, 1914

(Stamp)

At sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of Two Hundred and Thirty Two Pounds and Sixteen Shillings.

134

Value supplied in Coals and necessary disbursements to enable the steamer *Gerty* to proceed to Trieste.

G443

To Messrs. Fratelli Cosulich x at sixty days
Trieste.
Payable in London.

after sight

(Stamp)

Zacevich,

Master.

(Stamp)

Prot. n/p 9/- J.E.N. 18 Aug. 1914.

135

(Endorsement on back of draft)

FOR WATTS, WATTS & CO., LD.,
J. Ralph Williams,
Director.

Remitted for Collection by
London & Provincial Bank, Limited,
CARDIFF DOCKS
To
GLYN & Co.

136

ON THE Eighteenth day of August, One thousand nine hundred and fourteen, - - - at the Request of

MESSRS. GLYN & Co. OF LONDON, BANKERS.

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London did exhibit the original aforecopied Bill of Exchange, drawn upon Messrs. Fratelli Cosulich, to a Man in the Offices of the Kais. Koen. Priv. Oesterreichische Laenderbank in this City, where the said Bill is accepted payable, and demanded Payment thereof, Which Demand was not complied with and I received for answer: "We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present." 138

WHEREFORE, I the said Notary at the Request aforesaid Did and Do by these presents PROTEST against all whom it doth or may concern for Exchange and Reexchange, Cost, Damages and Interest Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the Presence of William John Weeks and Richard Dundy, Witnesses. 139

In testimonium veritatis

JOHN E. NEWTON,

NOTARY PUBLIC

140

Protest Non-Payment 9/-

(Stamp) (Seal)

Exhibit 6.

141

Copy

No. 4893 £232. 16. 0 Algiers, June 9th, 1914

Sixty

142

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of Two hundred and thirty-two Pounds and Sixteen Shillings. Value supplied in Coals and necessary disbursements to enable the steamer "Gerty" to proceed to Trieste. x at sixty days after sight To Messrs. Fratelli Cosulich,
Trieste

Zacevich,

Payable in London.

Master.

Accepted, Payable with Messrs. K. K. Priv. Oesterr-Laenderbank in London, Trieste 16th June, 1914, Fratelli Cosulich.

143

Endorsed: For Watts, Watts & Co., Ltd. J. Ralph Williams, Director, Remitted for collection by London & Provincial Bank, Limited Cardiff Docks To Glyn & Co.,
J. E. H. 18 Aug. 1914.

Protests ends.

(The following slips were annexed to the foregoing draft on its protest.)

144

We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present.

KAIS. KOEN. PRIVILEGIRTE OESTERREICHISCHE
LAENDERBANK.

9 Bishopsgate, London.

IF UNPAID, PLEASE

PROTEST

THE LONDON AND PROVINCIAL BANK, LIMITED,
CARDIFF DOCKS.

EXHIBIT 7.

145

No. 4898

Due 22 Aug.

£351. ~~At Thirty days after sight of this First of Ex-~~
Algiers, June 15th, 1914

(Stamp)

~~change (Second, being unpaid) pay to the Order~~
~~of Messrs. Watts, Watts & Co., Ltd., the sum of~~
~~Three Hundred and Fifty One Pounds Twelve~~
~~Shillings and Six Pence (GLYN)~~

(Stamp)

Value supplied in Coals and necessary disburse- 146
 ments to enable the Steamer *Argentina* to pro-
 ceed to Trieste.

To Messrs. Fratelli Cosulich x at sixty days
 Trieste after sight.
 Payable in London.

(Signature illegible) Master
 (Stamp)

Fratelli Cosulich

Prot.n/p 11/6 J.E.N. 22 Aug. 1914 9168

(Stamp)

Trieste 147

(Endorsement on back of draft)

FOR WATTS, WATTS & Co., LD.,
 J. Ralph Williams,
 Director.

Remitted for Collection by
 LONDON & PROVINCIAL BANK, LIMITED,
 CARDIFF DOCKS
 To
 GLYN & Co.

148

ON THE Twenty-second day of August, One thousand nine Hundred and fourteen, at the Request of

MESSRS. GLYN & Co., OF LONDON, BANKERS

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London did exhibit the original aforecopied
 150 Bill of Exchange, drawn upon Fratelli Cosulich, to a Man in the Offices of the Kais. Koen. Privilegirte Oesterreichische Landerbank in this City, where the said Bill is accepted payable, and demanded Payment thereof, Which Demand was not complied with and I received for answer that no person in authority was then there and that no order had been left respecting the said Bill. On Monday following, upon my again demanding
 151 ing Payment of the said Bill in the Offices of the said Kais. Koen. Privilegirte Oesterreichische Landerbank, a Clerk answered: "We are instructed by Sir William Plender, the Contrroller appointed by the British Government, not to make any payments at present."

WHEREFORE, I the said Notary at the Request aforesaid Did and Do by these presents PROTEST
 152 against all whom it doth or may concern for Exchange and Reexchange, Costs, Damages and Interest Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the Presence of William John Weeks and Richard Bundy,—Witnesses.

11/6

In testimonium veritatis

JOHN E. NEWTON,

NOTARY PUBLIC.

(Stamp) (Seal)

Copy

No. 4898 £351.12.6

Algiers, June 15th, 1914.

Sixty

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd. the sum of Three hundred and fifty one pounds twelve shillings and six pence. Value supplied in Coals and necessary disbursements to enable the steamer Argentina to proceed to Trieste. 154

To Messrs. Fratelli Cosulich X

Trieste at sixty days after sight.

(Signature illegible)

Payable in London.

Master

Accepted payable with Messrs. K. K. Priv. Oesterr Laenderbank in London, Trieste, 20th June, 1914. 155
Fratelli Cosulich.

Not negotiable a/c Watts, Watts & Co., Ltd., London & Provincial Bank, Ltd.

Endorsed: For Watts, Watts & Co., Ltd., J. Ralph Williams, Director. Remitted for collection by London & Provincial Bank, Limited, Cardiff Docks to Glyn & Co.,

J. E. H. 22 Aug. 1914.

156.

Protest ends

(The following slips were annexed to the foregoing draft on its protest.)

We are instructed by Sir. Wm. Plender, the controller appointed by the British Government, not to make any payments at present.

IF UNPAID

PLEASE PROTEST

THE LONDON AND PROVINCIAL BANK

LIMITED

CARDIFF DOCKS.

157

EXHIBIT 8.

No. 4901

Due 27 Aug.

Aug. 27

£1202.

(Stamp)

158

(Stamp)

G860

At Thirty days after sight of this First of Exchange (Second Being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of One Thousand Two Hundred and Two Pounds and Sixteen Shillings.

Value supplied in Coals and necessary disbursements to enable the steamer *Kaiser Franz Joseph I* to proceed to New York.

To Messrs. Fratelli Cosulich, x
Trieste, at sixty days
Payable in London. after sight

(Stamp)

159

C. Gerelimich,

Master

Prot n/p J.E.N. 27 Aug. 1914.

(Stamps)

(Endorsement on back of draft)

FOR WATTS, WATTS & CO. LD.

J. RALPH WILLIAMS,

Director.

160

Remitted for Collection by
London & Provincial Bank, Limited,
Cardiff Docks
To
GLYN & Co.

ON THE Twenty-seventh day of August, One thousand nine Hundred and fourteen, - - - at the Request of

MESSRS. GLYN & Co. OF LONDON, BANKERS.

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London did exhibit the original aforecopied Bill of Exchange, drawn upon Messrs. Fratelli Cosulich, to a Man in the Offices of the Kais. Koen. Privilegirte Oesterreichische Laenderbank in this City, where the said Bill is accepted payable, and demanded Payment thereof, Which Demand was not complied with and I received for answer that no person in authority was then there and that no orders had been left respecting the said Bill. 162

On the day following, upon my again demanding Payment of said Bill to the Offices of the said Kais. Koen. Privilegirte Oesterreichische Laenderbank, a Clerk answered: "We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present." 163

WHEREFORE I the said Notary at the Request aforesaid Did and Do by these presents PROTEST against all whom it doth or may concern for Exchange and Reexchange, Costs, Dames and Interest Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the Present of William John Weeks and Richard Bundy, Witnesses. 164

In testimonium veritatis

Protest Non-payment 14/- JOHN E. NEWTON,
(Stamp) (Seal) Notary Public.

165

Exhibit 8.

Copy

No. 4901 £1202.16.0 Algiers, June 18, 1914

Sixty

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of One Thousand Two Hundred and Two Pounds and Sixteen Shillings. Value supplied in coals and

166

necessary disbursements to enable the steamer Kaiser Franz Joseph I to proceed to New York.

x at sixty days after sight

To Messrs. Fratelli Cosulich

Trieste.

G. Gerolimich,
Master.

Payable in London

167

Accepted payable with Messrs. K.
K. Priv. Oesterr-Laenderbank in
London, Trieste 25th June, 1914.

Fratelli Cosulich

Endorsed: For Watts, Watts & Co., Ltd., J.
Ralph Williams, Director.

Remitted for collection by London & Provincial Bank, Limited, Cardiff Docks to Glyn & Co.

J. E. N. 27 Aug. 1914.

168

Protest ends.

(The following slip was annexed to the foregoing draft on its protest)

We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present.

KAIS. KOEN. PRIVILEGIIRTE OESTERREICHISCHE
LAENDERBANK.

9 Bishopsgate, London.

No. 4903

£169. 15. 0

Due 1 Sept.

Algiers, June 23rd, 1914.

(Stamp)

At sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the Sum of One hundred and sixty nine Pounds and fifteen Shillings.

(Stamp)

Value supplied in, and necessary disbursements to enable the steamer *Campania* to proceed to New York. To Messrs. Fratelli Cosulich x at sixty days after sight. Payable in London. (Stamp)

Fhupit,
Master.

Prot. n/p J. E. N. 1 Sep. 1914.

(Endorsement on back of draft)

171

FOR WATTS, WATTS & CO. LD.

J. Ralph Williams,

Director.

Remitted for Collection by

LONDON & PROVINCIAL BANK, LTD.,

CARDIFF DOCKS

To

GLYN & Co.

172

ON THE First day of September, One thousand nine Hundred and fourteen, - - - at the Request of

MESSRS. GLYN & Co. OF LONDON, BANKERS.

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London did exhibit the original aforecopied
 174 Bill of Exchange drawn upon Messrs. Fratelli Cosulich, to a Man in the Offices of the Kais. Koen. Privilegirte Oesterreichische Laenderbank in this City, with which Bank the said Bill is accepted payable, and demanded Payment thereof, Which Demand was not complied with and I received for answer that no person in authority was then there and that no orders had been left respecting the said Bill.

175 Afterwards, upon again demanding Payment of the said Bill in the Offices of the said Kais. Koen. Privilegirte Oesterreichische Laenderbank, a Clerk answered: "We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present."

WHEREFORE, I the said Natory at the Request aforesaid Did and Do by these presents PROTEST against all whom it doth or may concern for Exchange and Reexchange, Costs, Damages and Interest Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the presence of William John Weeks and Richard Bundy, Witnesses.

Protest Non-payment 11/6

In testimonium veritatis

JOHN E. NEWTON

(Stamp) (Seal)

Notary Public

Exhibit 9.

177

No. 4908 £169.15.0 Algiers, June 23rd, 1914.

x Sixty

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of One hundred and sixty-nine pounds and fifteen shillings. Value supplied in coals and necessary disbursements to enable the steamer Campania to proceed to New York

178

x at sixty days after sight.

Fhupit,

Master.

To Messrs. Fratelli Cosulich

Trieste

Payable in London.

Accepted payable with Messrs. K. K.

Priv. Oesterr-Laenderbank in

London, Trieste 30th June, 1914. 179

Fratelli Cosulich

Endorsed: For Watts, Watts & Co., Ltd. J. Ralph Williams, Director.

Remitted for collection by London & Provincial Bank, Limited. Cardiff Docks to Glyn & Co.

J. E. N. 1 Sept. 1914.

Protest ends

(The following slips were annexed to the foregoing draft on its protest.) 180

We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present.

KAIS. KOEN. PRIVILEGIIRTE OESTERREICHISCHE
LAENDERBANK.

9 Bishopsgate, London.

IF UNPAID, PLEASE PROTEST

THE LONDON & PROVINCIAL BANK, LTD.,
CARDIFF DOCKS.

181

EXHIBIT 10.

Due 4 Sept.

No. 4905

£423. 3. 3.

Algiers, June 26th, 1914.

(Stamp)

182

(Stamp)

(Stamp)

At Thirty days after sight of this First of Exchange (second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the Sum of Four Hundred and Twenty-Three Pounds Three Shillings and Three Pence.

Value supplied in Coals and necessary disbursements to enable the steamer *Belvedere* to proceed to New York.

To Messrs. Fratelli Cosulich x at sixty days after sight

Payable in London.

Trieste

London & Provincial Bank, Ltd.

Watts, Watts & Co., Ltd.

Not Negotiable

PAID TO ORDER OF THE BANK OF ENGLAND

SEP 1 1914

GLYN & CO.

G. Cosulich,
Master

Prot n/p J.E.N. 4 Sep. 1914.

183

(Endorsement on back of draft)

FOR WATTS, WATTS & CO. LTD.
J. Ralph Williams, Director.

Remitted for Collection by
London & Provincial Bank, Limited,
Cardiff Docks
To
GLYN & Co.

184

Exhibit 10.

185

ON THE Fourth day of September, One thousand nine Hundred and fourteen, - - - at the Request of

MESSRS. GLYN & Co. OF LONDON, BANKERS.

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London did exhibit the original aforecopied Bill of Exchange, drawn upon Messrs. Fratelli Cosulich, to a Man at the Office of the Kais. Koen. Privilegirte Oesterreichische Laenderbank, situate No. 9 Bishopsgate, London, E. C., with which Bank the said Bill is accepted payable, and demanded Payment thereof, Which Demand was not complied with and I received for answer that no person in authority was then there and that no orders had been left respecting the said Bill. 186

On the following day, I again went with the said Bill to the Offices of the said Kais. Koen. Privilegirte Oesterreichische Landerbank, situate as aforesaid, and therein exhibiting it to a Clerk, repeated my demand for Payment thereof, Which Demand was also not complied with, the said Clerk answering: "We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present." 187

WHEREFORE, I the said Notary at the Request aforesaid Did and Do by these presents PROTEST against all whom it doth or may concern for Exchange and Reexchange, Costs, Damages and Interest Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the Presence of William John Weeks and Richard Bundy, Witnesses. 188

Protest non-payment 11/6

In testimonium veritatis,

JAMES E. NEWTON

NOTARY PUBLIC

(Stamp) (Seal)

Copy

Due 4 Sept.

No. 4905 £423. 3. 3

Algiers, June 26, 1914.

x Sixty

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd. the sum of
 190 Four hundred and twenty-three pounds three shillings and three pence. Value supplied in Coals and necessary disbursements to enable the steamer Belvedere to proceed to New York.

To Messrs. Fratelli Cosulich x

Trieste at sixty days after sight
 Payable in London. G. Cosulich, Master.

(9205) Accepted Payable with
 Messers. K. K. Oesterr-Laenderbank
 in London, Trieste 3rd July, 1914.

191 Fratelli Cosulich.

Endorsed: For Watts, Watts & Co., Ltd. Joseph
 Williams Director.

Remitted for collection by London & Provincial Bank, Limited, Cardiff Docks to Glyn & Co.

J. E. N. 4 Sept. 1914.

Protest ends.

(The following slips were annexed to the fore-
 192 going draft on its protest.)

We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present.

KAIS. KOEN. PRIVILEGIIRTE OESTERREICHISCHE
 LAENDERBANK.

9 Bishopsgate, London.

IF UNPAID, PLEASE PROTEST

THE LONDON AND PROVINCIAL BANK,
 LIMITED. CARDIFF DOCKS.

EXHIBIT 11.

193

Due 4 Sept.
Algiers, June 28th, 1914

£272 8 6

Sixty

Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the Sum of Nine Hundred and Seventy Two Pounds Eight Shillings and Six Pence.

Value applied in Coals and necessary disbursements to enable the steamer *Martha Washington* to proceed to Trieste.

To Messrs. Fratelli Conalich x

Trieste, London at sixty days after sight.

Payable in London. (Stamp)

(Signature illegible)

(Stamp) Prot. n/p 14/- Master.

J.E.N. 4 Sept. 1914

(Stamps)

195

(Endorsement on back of draft)

FOR WATTS, WATTS & CO. LTD.

J. RALPH WILLIAMS,

Director.

Remitted for Collection by
London & Provincial Bank, Limited,
Cardiff Docks

To

GLYN & Co.

196

ON THE Fourth day of September, One thousand nine hundred and fourteen, - - - at the Request of

MESSRS. GLYN & CO. OF LONDON, BANKERS.

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London did exhibit the original aforecopied
 198 Bill of Exchange, drawn upon Messrs. Fratelli Cosulich, to a Man at the Offices of the Kais. Koen. Privilegirte Oesterreichische Laenderbank, situate No. 9 Bishopsgate, London, E. C. with which Bank the said Bill is accepted payable and demanded Payment thereof, Which Demand was not complied with and I received for answer that no person in authority was then there and that no order had been left respecting the said Bill.

On the day following, I again went with the
 199 said Bill to the Offices of the said Kais. Koen. Privilegirte Oesterreichische Laenderbank, situate as aforesaid, and therein exhibiting it to a Clerk, repeated my demand for Payment thereof, Which Demand was also not complied with, the said Clerk answering: "We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present."

200 WHEREFORE, I the said Notary at the Request aforesaid Did and Do by these presents PROTEST against all whom it doth or may concern for Exchange and Reexchange, Costs, Damages and Interest Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the Presence of William John Weeks and Richard Bundy, Witnesses.

Protest non-payment 14/—

In testimonium veritatis

JOHN E. NEWTON,

(Stamp) (Seal)

NOTARY PUBLIC.

Copy

No. 4906 £ 972. 8. 6

Due 4 Sept.

Algiers, June 28th, 1914

x Sixty

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd. the sum of Nine Hundred and Seventy Two Pounds Eight Shillings and Six Pence. Value supplied in 202
 Coals and necessary disbursements to enable the steamer Martha Washington to proceed to Trieste.

To Messrs. Fratelli Cosulich x

Trieste, at sixty dys after sight

(9206) (Signature illegible)

Payable in London.

Master.

Accepted payable with Messrs. K.

K. Priv. Oesterr-Laenderbank in 203

London. Trieste, 3rd July, 1914.

Fratelli Cosulich.

Endorsed: For Watts, Watts & Co., Ltd. Joseph Williams, Director. Remitted for collection by London & Provincial Bank, Limited, Cardiff Docks to Glyn & Co.

J. E. N. 4 Sept. 1914.

Not Negotiable.

A/c Watts, Watts & Co., Ltd.,

London & Provincial Bank, Limited. 204

Protest ends.

(The following slip was annexed to the foregoing draft on its protest.)

We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present.

KAIS. KOEN PRIVILEGIIRTE OESTERREICHISCHE

LAENDERBANK.

9 Bishopsgate, London.

EXHIBIT 12

205

No. 4908

£579. 11. 6.

Ltd.

Due 12 Sept.
Algiers, July 3rd, 1914

(Stamp)

Sixty

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the Sum of Five Hundred and Seventy-nine Pounds Eleven

Shillings and Six Pence.

Value supplied in Coals and necessary disbursements to enable the steamer *Argentina* to proceed to New York

To Messrs. Fratelli Cosulich, x

Trieste, at sixty days after sight

Payable in London.

(Signature illegible)

(Stamp) (Stamp)

Master

Prot. N/P 14/- J.E.N. 12 Sep. 1914.

207

(Endorsement on back of draft)

FOR WATTS, WATTS & CO., LTD.,

JNO. A. JONES,

Director.

Remitted for Collection by
London & Provincial Bank, Limited,
Cardiff Docks

To

GLYN & Co.

208

ON THE Twelfth day of September, One Thousand nine Hundred and fourteen, - - - at the Request of

MESSRS. GLYN & CO. OF LONDON, BANKERS.

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London went with the original aforecopied Bill of Exchange, drawn upon Messrs. Fratelli Cosulich, to No. 9 Bishopsgate, London, E. C., the address of the Kais. Koen. Privilegirte Oesterreichische Laenderbank, with which Bank the said Bill is accepted payable, in order to demand Payment thereof, but found the Offices of said Bank closed for the day. 210

On Monday following, I again went with the said Bill to the Offices of the said Kais. Koen. Privilegirte Oesterreichische Laenderbank, situate as aforesaid, and therein exhibiting it to a Clerk, demanded Payment thereof, Which Demand was not complied with and I received for answer: "No advice." 211

WHEREFORE, I the said Notary at the Request aforesaid Did and Do by these presents PROTEST against all whom it doth or may concern for Exchange and Reexchange, Costs, Damages and Interest Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the Presence of William John Weeks and Richard Bundy, Witnesses 212

In testimonium veritatis

Protest non-payment 14/-
(Stamp) (Seal)

JOHN E. NEWTON,
Notary Public.

213

Exhibit 12.

COPY

No. 4908 £579. 11. 6 Algiers, July 3, 1914
 xSixty

214 At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the Sum of Five Hundred and seventy-nine pounds eleven shillings and six pence. Value supplied in Coals and necessary disbursements to enable the steamer *Argentina* to proceed to New York.

To Messrs. Fratelli Cosulich, x
 Trieste. at sixty days after sight
 Payable in London. (Signature illegible)
 Master.

Not Negotiable

A/c Watts, Watts & Co., Ltd.,
 London & Provincial Bank, Ltd.
 215 Accepted payable with Messrs. K.
 K. Priv. Oesterr Laenderbank in
 London Trieste 11th July, 1914

Endorsed: For Watts, Watts & Co., Ltd., Jas. A. Jones, Director Remitted for collection by London & Provincial Bank, Limited, Cardiff Docks to Glyn & Co.

J. E. N. 12 Sept. 1914

216

EXHIBIT 13.

217

No. 4910

£567.

Due 12 Sept.

Algiers, July 6th, 1914

(Stamp)

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of five hundred and sixty-one pounds seven shillings and nine pence.

GLYN

(Stamp)

Value supplied in goods and necessary disbursements to enable the steamer *Oceania* to proceed to Trieste.

To Messrs. Fratelli Cosulich x at sixty days
Trieste after sight.

Payable in London. 9233

(Stamp)

H597

(Signature illegible) Master.

(Stamp) Prot. N. P. J. E. N. 12 Sep. 1914.

(Endorsement on back of draft)

219

FOR WATTS, WATTS & CO. LD.

JNO. A. JONES,

Director.

Remitted for Collection by

LONDON & PROVINCIAL BANK, LTD.,

CARDIFF DOCKS

To

GLYN & Co.

220

ON THE Twelfth day of September, One thousand nine Hundred and fourteen, - - - at the Request of

MESSRS. GLYN & Co., OF LONDON, BANKERS.

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London went with the original **222** *aforecopied Bill of Exchange, drawn upon Messrs. Fratelli Cosulich, to No. 9 Bishopsgate, London, E. C., the address of the Kais. Koen. Privilegirts Oesterreichische Laenderbank, with which Bank the said Bill is accepted payable, in order to demand Payment thereof, but found the Offices of said Bank closed for the day.*

On Monday following, I again went with the said bill to the offices of the said Kais. Koen. Privilegirts Oesterreichische Laenderbank, situate as **223** *aforesaid, and therein exhibiting it to a Clerk, demanded Payment thereof, which demand was not complied with and I received for answer: "No advice."*

WHEREFORE, I the said Notary at the Request aforesaid Did and Do by these presents **224** *PROTEST against all whom it doth or may concern for Exchange and Reexchange, Costs, Damages and Interest, Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the Presence of William John Weeks and Richard Bundy,—Witnesses.*

14/—

In testimonium veritatis

JOHN E. NEWTON,

(Stamp) (Seal)

NOTARY PUBLIC

Copy

No. 4910. £561.7.9 Algiers, July 6th, 1914

Sixty

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the order of Messrs. Watts, Watts & Co., Ltd., the sum of Five hundred and sixty-one pounds seven shillings and nine pence Value supplied in Coals and necessary disbursements to enable the steamer "Oceania" to proceed to Trieste. 226

To Messrs. Fratelli Cosulich x

Trieste at Sixty days after sight
(Signature illegible) Master.

Payable in London

Accepted payable with Messrs. K.
K. Priv. Oesterr. Laendenbank in
London, Trieste 11th July, 1914.

File. Cosulich

227

Endorsed: For Watts, Watts & Co., Ltd., Jno. A.
Jones Director Remitted for Collection by
London & Provincial Bank, Limited, Cardiff
Docks to Glyn & Co.

J. E. N. 12 Sept. 1914.

Protest ends.

(The following slips were annexed to the foregoing draft on its protest.) 228

IF UNPAID PLEASE PROTEST

THE LONDON AND PROVINCIAL BANK, LIMITED.

CARDIFF DOCKS.

KAIS. KOEN. PRIV. OESTERRICHISCHE

LAENDERBANK LONDON

No ADVICE

Two BILLS £ 561.7.9.

£ 579.11.6

229

EXHIBIT 14.

No. 4914

£973. 12 9

Ltd.
Bank, Ltd.

Due 22 Sept.

Algiers, July 13th, 1914

230 2684

(Stamp)

At Thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd., the sum of Nine Hundred and Seventy-three pounds twelve shillings and nine pence.

Value supplied in Coals and necessary disbursements to enable the steamer *Kaiser Fr. Joseph* to proceed to Trieste.

To Messrs. Fratelli Conulich x at sixty days
Trieste, London after sight

Payable in London.

(Signature illegible)

Master

Prot. n/p 14/ J.E.N. 22 Sep. 1914.

231

Consulich, 9252

(Stamped Fratelli

Trieste)

(Endorsement on back of draft)

FOR WATTS, WATTS & CO. LTD.

JNO. A. JONES,

Director.

232

Remitted for Collection

by

London & Provincial Bank, Ltd.

Cardiff Docks

To

H. O.

ON THE Twenty-second day of September,—
One thousand nine Hundred and fourteen, - - -
at the Request of

THE LONDON AND PROVINCIAL BANK, LIMITED,
LONDON.

I, JOHN EDWARD NEWTON, NOTARY PUBLIC by
lawful Authority Admitted and Sworn practis- 234
ing in London did exhibit the original afore-
copied Bill of Exchange, drawn upon Messrs.
Fratelli Cosulich, to a Woman in the Offices of
the Kais. Koen. Privilegirte Oesterreichische
Laenderbank, situate No. 9 Bishopsgate, London,
E. C., with which Bank the said Bill is accepted
payable, and demanded Payment thereof, Which
Demand was not complied with and I received
for answer that no person in authority was then
there and that no orders had been left respect- 235
ing said Bill. On the day following, upon my again
demanding Payment of said Bill in the Offices
of the said Kais. Koen. Privilegirte Oester-
reichische Laenderbank, a Clerk answered "No
advice."

WHEREFORE, I the said Notary at the Request
aforesaid Did and Do by these presents PROTEST
against all whom it doth or may concern for
Exchange and Reexchange, Costs, Damages and
Interest Suffered and to be Suffered for want 236
of Payment of the said Bill of Exchange. Thus
Protested at London aforesaid in the Presence
of William John Weeks and Richard Bundy,—
Witnesses.

Protest non-payment 14/—

In testimonium veritatis

JOHN E. NEWTON,

(Stamp) (Seal)

NOTARY PUBLIC.

237

Exhibit 14.

Copy

Due 22 Sept.

No. 4914 £973. 12. 9 Algiers, July 13, 1914.

sixty

238

At thirty days after sight of this First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd. the sum of nine hundred and seventy-three pounds twelve shillings and nine pence Value supplied in Coals and necessary disbursements to enable the steamer "Kaiser F. Joseph" to proceed to Trieste.

To Messrs. Fratelli Cosulich x

at sixty days after sight

Trieste

9252

Payable in London.

Myerolumice, Master.

239

Accepted Payable with Messrs. K. K. Priv. Oester Laenderbank in London, Trieste 21st July, 1914. Fratelli Cosulich.

Endorsed: For Watts, Watts & Co., Ltd. Jno. A Jones Director. Remitted for collection by London & Provincial Bank, Limited, Cardiff Docks to H. O.

J. E. N. 22 Sep. 1914.

240 H. 902 Est. R. 69

Protest ends.

(The following slips were annexed to the foregoing draft on its protest.)

KAIS. KOEN. PRIV. OESTERREICHISCHE
LAENDERBANK, LONDON.

NO ADVICE.

IF UNPAID PLEASE PROTEST

THE LONDON AND PROVINCIAL BANK, LIMITED,
CARDIFF DOCKS.

Due 1 Oct.

No. 4921

£735. 19. 9.

Algiers, July 23rd, 1914

(Stamp)

At Thirty days after sight of this First of Exchange (Second being unpaid) to the Order of Messrs. Watts, Watts & Co., Ltd., the Sum of Seven Hundred and Thirty-five pounds nineteen shillings and nine pence

Carried supplied in Coals and necessary disbursements to enable the steamer *Martha Washington* to proceed to New York.

To Messrs. Fratelli Cosulich x

Trieste. A/c London
 Payable in London. (Stamped)

Fratelli

Cosulich,

Master. 9284)

Prot. n/p 11/6 J.E.N. o Oct. 1914.

243

(Endorsement on back of draft)

FOR WATTS, WATTS & CO. LTD.

Jno. A. Jones,

Director.

Remitted for Collection by
 London & Provincial Bank, Limited,
 Cardiff Docks

To
 H. O.

244

245

Exhibit 15.

ON THE First day of October, One thousand nine hundred and fourteen, - - - at the Request of

THE LONDON AND PROVINCIAL BANK, LIMITED,
LONDON.

246 I. JOHN EDWARD NEWTON, NOTARY PUBLIC by lawful Authority Admitted and Sworn practising in London did exhibit the original aforecopied Bill of Exchange, drawn upon Messrs. Fratelli Cosulich, to a Woman in the Offices of the Kais. Koen. Privilegirte Oesterreichische Laenderbank in this City, with which Bank the said Bill is accepted payable, and demanded Payment thereof, Which Demand was not complied with and I received for answer: "No advice."

247 WHEREOF, I the said Notary at the Request aforesaid Did and Do by these presence PROTEST against all whom it doth or may concern for Exchange and Reexchange, Costs, Damages and Interest Suffered and to be Suffered for want of Payment of the said Bill of Exchange. Thus Protested at London aforesaid in the Presence of William John Weeks and Richard Bundy, Witnesses.

Protest Non-Payment 11/6

248

In testimonium Veritatis

JOHN E. NEWTON,

(Stamp) (Seal)

Notary Public.

Copy

No. 4921 £735.19.9 Algiers, July 23rd, 1914.

Sixty

After Thirty days after sight of the First of Exchange (Second being unpaid) pay to the Order of Messrs. Watts, Watts & Co., Ltd. the sum of Seven Hundred and Thirty-five Pounds Nineteen Shillings and nine pence Value supplied in Coals and necessary disbursements to enable the steamer Martha Washington to proceed to New York. **250**

To Messrs. Fratelli Cosulich x
Trieste at sixty days after sight.
Master.

Payable in London

Accepted payable with Messrs. K.
K. Priv. Oester Laenderbank in
London, Trieste, 30th July, 1914, **251**
Fratelli Cosulich.

Endorsed: For Watts, Watts & Co., Ltd. Jno. A.
Jones, Director. Remitted for Collection by
London & Provincial Bank, Limited, Cardiff
Docks to H. O.

J. E. N. 1 Oct. 1914.

Protest ends.

(The following slips were annexed to the fore-
going draft on its protest.) **252**

KAIS. KOEN. PRIV. OESTERREICHISCHE
LAENDERBANK, LONDON.

NO ADVICE.

IF UNPAID, PLEASE PROTEST

THE LONDON AND PROVINCIAL BANK, LIMITED,
CARDIFF DOCKS. PROTEST.

Enclosure to CARDIFF from WATTS, WATTS & Co.,
LTD., LONDON. (Foreign Coaling Depart-
ment.)

253

EXHIBIT 17.

BY THE KING

A PROCLAMATION

RELATING TO TRADING WITH THE ENEMY.

GEORGE R. I.

WHEREAS a state of war exists between Us and the German Emperor:

254 And WHEREAS it is contrary to law for any person resident, carrying on business, or being in Our Dominion, to trade or have any commercial intercourse with any person resident, carrying on business, or being in the German Empire without Our Permission:

And WHEREAS it is therefore expedient and necessary to warn all persons resident, carrying on business, or being in Our Dominions, of their duties and obligations towards Us, Our Crown, and Government:

255 Now, THEREFORE, We have thought fit, by and with the advice of Our Privy Council, to issue Our Royal Proclamation, and We do hereby warn all persons resident, carrying on business, or being in our Dominions:

256 Not to supply to or obtain from the said Empire any goods, wares, or merchandise, or to supply to or obtain the same from any person resident, carrying on business, or being therein, not to supply to or obtain from any person any goods, wares or merchandise for or by way of transmission to or from the said Empire, or to or from any person resident, carrying on business, or being therein, nor to trade in or carry any goods, wares, or merchandise destined for or coming from the said Empire, or for or from any person resident, carrying on business, or being therein:

Nor to permit any British ship to leave for, en-

ter, or communicate with any port or place of the said Empire:

Nor to make or enter into any new marine, life, fire, or other policy or contract of insurance with or for the benefit of any person resident, carrying on business, or being in the said Empire, nor under any existing policy or contract of insurance to make any payment to or for the benefit of any such person in respect of any loss due to the belligerent action of His Majesty's forces or of these of any ally of His Majesty: 258

Nor to enter into any new commercial, financial, or other contract or obligation with or for the benefit of any person resident, carrying on business, or being in the said Empire:

And We do hereby further warn all persons that whoever in contravention of the law shall commit, aid, or abet any of the aforesaid acts will be liable to such penalties as the law provides: 259

And We hereby declare that any transactions to, with, or for the benefit of any person resident, carrying on business, or being in the said Empire which are not treasonable and are not for the time being expressly prohibited by Us either by virtue of this Proclamation or otherwise, and which but for the existence of the state of war aforesaid would be lawful, are hereby permitted: 260

And We hereby declare that the expression "person" in this Proclamation shall include any body of persons corporate or unincorporate, and that where any person has, or has an interest in, houses or branches of business in some other country as well as in Our Dominions, or in the said Empire (as the case may be), this Proclamation shall not apply to the trading or commercial

261

Exhibit 18.

intercourse carried on by such person solely from or by such houses or branches of business in such other country.

262

Given at Our Court at Buckingham Palace, this Fifth day of August, in the year of our Lord one thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

GOD SAVE THE KING.

EXHIBIT 18.

THE LONDON GAZETTE.

Friday, 14 August, 1914.

263

NOTICE

Diplomatic relations between France and Austria being broken off, the French Government have requested his Majesty's Government to communicate to the Austro-Hungarian Ambassador in London the following Declaration:

264

“Après avoir déclaré la guerre à la Serbie et pris ainsi la première initiative des hostilités en Europe, le Gouvernement Austro-Hongrois s'est mis, sans aucune provocation du Gouvernement de la République Française, en état de guerre avec la France;

10.—Après que l'Allemagne avit successivement déclaré la guerre à la Russie et à la France, il est intervenue dans ce conflit en déclarant la guerre à la Russie qui combattait déjà aux côtes de la France.

20—D'après de nombreuses informations dignes de foi, l'Autriche a envoyé des troupes sur la frontière allemande, dans des conditions qui constituent une menace directe à l'égard de la France.

En présence de cet ensemble de faits le Gouvernement Français se voit obligé de déclarer au Gouvernement Austro-Hongrois qu'il va toutes les mesures qui lui permettront de répondre à ces actes et à ces menaces." 266

In communicating this Declaration accordingly to the Austro-Hungarian Ambassador, His Majesty's Government have declared to His Excellency that the rupture with France having been brought about in this way, they feel themselves obliged to announce that a state of war exists between Great Britain and Austria-Hungary as from midnight. 267

Foreign Office,

August 12th, 1914.

BY THE KING

A PROCLAMATION

EXTENDING THE SCOPE OF CERTAIN EXISTING PROCLAMATIONS AND A CERTAIN ORDER IN COUNCIL CONNECTED WITH THE WAR.

GEORGE R. I. 268

WHEREAS on the fourth day of August, one thousand nine hundred and fourteen a State of War came into existence between Us on the one hand and the German Empire on the other.

AND WHEREAS We did on the same date and on the fifth day of August, one thousand nine hundred and fourteen, issue certain Proclamations and Orders in Council connected with such State of War:

AND WHEREAS a State of War now exists between Us on the one hand and the Dual Monarchy of Austria-Hungary on the other:

AND WHEREAS it is therefore desirable to extend the scope of certain of the Proclamations and Orders in Council aforesaid:

270 Now, THEREFORE, We have thought fit by and with the advice of Our Privy Council, to issue this Our Royal Proclamation declaring and it is hereby declared as follows:—

1. The Proclamation warning all Our Subjects and all persons resident or being in Our Dominions from contributing to, or participating in or assisting in the floating of, any loan raised on behalf of the German Government, or from advancing money to or entering into any contract or dealing whatsoever with the said Government, or otherwise aiding, abetting, or assisting the said Government, shall be deemed as from this date to apply to all loans raised on behalf of, or contracts or dealings entered into with, or to aiding, abetting, or assisting the Austro-Hungarian Government.

271 2. The Proclamation on Trading with the Enemy shall be deemed from this date to prohibit with the Dual Monarchy of Austria-Hungary all commercial intercourse, which under the said Proclamation is prohibited with the German Empire, and for this purpose such Proclamation shall be read as if throughout the operative portion thereof, the words "either the German Empire or the Dual Monarchy of Austria-Hungary" were substituted for the words "the German Empire."

3. (1) In the Order in Council issued with reference to the departure from Our Ports of

enemy vessels, which at the outbreak of hostilities were in any such Port or which subsequently entered the same, the word "enemy" as applied to either ships or cargo, shall be deemed as from this date to include Austro-Hungarian ships or cargo.

(2) In the application of this Article to Austro-Hungarian ships the date Saturday, the Fifteenth day of August, shall be substituted for the date mentioned in Article 2 of the said Order in Council, and the date Saturday, the Twenty-second day of August shall be substituted for the date mentioned in Article 3 of the said Order in Council. 274

4. The Proclamation specifying the articles which it is Our intention to treat as Contraband of War during the war with Germany shall be deemed to specify the articles which it is Our intention to treat as Contraband of War during the war with Austria-Hungary. 275

5. In the Proclamation forbidding the carriage in British vessels from any Foreign Port to any other Foreign Port of any article comprised in the list of Contraband of War issued by Us, unless the shipowner shall have first satisfied himself that the articles are not intended ultimately for use in the enemy country, the words "enemy country" shall be deemed as from this date to include the Dual Monarchy of Austria-Hungary. 276

Given at Our Court at Buckingham Palace, this Twelfth day of August, in the year of our Lord, one thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

GOD SAVE THE KING.

277

EXHIBIT 19

By The KING

A PROCLAMATION

RELATING TO TRADING WITH THE ENEMY.

GEORGE R. I.

WHEREAS a state of War has existed between Us and the German Empire as from 11 p. m. on August 4th, 1914, and a state of War has existed
278 between Us and the Dual Monarchy of Austria-Hungary as from mid-night on August 12th, 1914:

AND WHEREAS it is contrary to law for any person resident, carrying on business, or being in Our Dominions, to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without Our permission:

279 AND WHEREAS by Our Proclamation of the 5th August, 1914, relating to trading with the enemy, certain classes of transactions with the German Empire were prohibited:

AND WHEREAS by paragraph 2 of our Proclamation of the 12th August, 1914, the said Proclamation of the 5th August, 1914, was declared to be applicable to Austria-Hungary:

280 AND WHEREAS it is desirable to restate and extend the prohibitions contained in the former Proclamations, and for that purpose to revoke the Proclamation of the 5th August, 1914, and paragraph 2 of the Proclamation of the 12th August, 1914, and to substitute this Proclamation therefor:

AND WHEREAS it is expedient and necessary to warn all persons resident, carrying on business or being in Our Dominions, of their duties and obligations toward Us, Our Crown, and Government:

Now, THEREFORE, We have thought fit, by and with the advice of our Privy Council, to issue this Our Royal Proclamation declaring and it is hereby declared as follows:

1. The aforesaid Proclamation of the 5th August, 1914, relating to trading with the Enemy, and paragraph 2 of the aforesaid Proclamation of the 12th August, 1914, together with any public announcement officially issued in explanation thereof, are hereby, as from the date hereof, revoked, and from and after date hereof this present Proclamation is substituted therefor. 282

2. The expression "enemy country" in this Proclamation means the territories of the German Empire and of the Dual Monarchy of Austria-Hungary, together with all the colonies and dependencies thereof.

3. The expression "enemy" in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country. 283

4. The expression "outbreak of war" in this Proclamation means 11 p. m. on the 4th August, 1914, in relation to the German Empire, its colonies and dependencies, and midnight on the 12th August, 1914, in relation to Austria-Hungary, its colonies and dependencies. 284

5. From and after the date of this Proclamation the following prohibitions shall have effect (save so far as licenses may be issued as herein-

after provided), and We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions—

(1) Not to pay any sum of money to or for the benefit of an enemy.

(2) Not to compromise or give security for the payment of any debt or other sum of money with
286 or for the benefit of an enemy.

(3) Not to act on behalf of an enemy in drawing, accepting, paying, presenting for acceptance or payment, negotiating or otherwise dealing with any negotiable instrument.

(4) Not to accept, pay, or otherwise deal with any negotiable instrument which is held by or on behalf of an enemy, provided that this prohibition shall not be deemed to be infringed by any person
287 who has no reasonable ground for believing that the instrument is held by or on behalf of an enemy.

(5) Not to enter into any new transaction, or complete any transaction already entered into with an enemy in any stocks, shares, or other securities.

(6) Not to make or enter into any new marine, life, fire or other policy or contract of insurance with or for the benefit of an enemy; not to accept,
288 give effect to any insurance of, any risk arising under any policy or contract of insurance (including re-insurance) made or entered into with or for the benefit of an enemy before the outbreak of War.

(7) Not directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy country, or an enemy, any goods, wares or merchandise, nor directly or indirectly to supply to or for the use or benefit of, or obtain from any per-

son any goods, wares or merchandise, for or by way of transmission to or from an enemy country or an enemy, nor directly or indirectly to trade in or carry any goods, wares or merchandise destined for or coming from an enemy country or an enemy.

(8) Not to permit any British ship to leave for, enter or communicate with, any port or place in an enemy country. 290

(9) Not to enter into any commercial, financial or other contract or obligation with or for the benefit of an enemy.

(10) Not to enter into any transaction with an enemy if and when they are prohibited by an order of Council made and published on the recommendation of a Secretary of State, even though they would otherwise be permitted by law or by this or any other Proclamation. 291

AND WE DO HEREBY FURTHER WARN all persons that whoever in contravention of the law shall commit, aid or abet any of the aforesaid acts, is guilty of a crime, and will be liable to punishment and penalties accordingly.

6. Provided always that where an enemy has a branch locally situated in British, allied or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy. 292

7. Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in Our Dominions, if such payments arise out of transactions entered into before the outbreak of War or otherwise permitted.

8. Nothing in this Proclamation shall be taken to prohibit anything which shall be expressly permitted by Our licence, or by the licence given on Our behalf by a Secretary of State, or the Board of Trade, whether such licences be especially granted to individuals or be announced as applying to classes of persons.

294 9. This Proclamation shall be called the Trading with the Enemy Proclamation No. 2.

Given at Our Court at Buckingham Palace, this Ninth day of September, in the Year of our Lord one thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

GOD SAVE THE KING.

EXHIBIT 20.

TRADING WITH THE ENEMY ACT, 1914

(4 & 5 GEO. 5, c. 87)

An Act to make provision with respect to penalties for Trading with the Enemy and other Purposes connected therewith.

296 BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) Any person who during the present war trades or has, since the fourth day of August nineteen hundred and fourteen, traded with the enemy within the meaning of this Act shall be guilty of a misdemeanour and shall—

- (a) on conviction under the Summary Jurisdiction Acts, be liable to imprisonment with or without hard labor for a term not exceeding twelve months, or to a fine not exceeding five hundred pounds, or to both such imprisonment and fine; or
- (b) on conviction on indictment, be liable to 298
penal servitude for a term not exceeding seven or less than three years or to imprisonment with or without labor for a term not exceeding two years, or to a fine, or to both such penal servitude or imprisonment and fine;

and the Court may in any case order that any goods or money in respect of which the offence has been committed, be forfeited. 299

(2) For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was at the time of such transaction or act prohibited by or under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy:

Provided that any transaction or act permitted by or under any such Proclamation shall not be deemed to be trading with the enemy. 300

(3) Where a company has entered into a transaction or has done any act which is an offence under this section, every director, manager, secretary, or other officer of the company who is knowingly a party to the transaction or act shall also be deemed guilty of the offence.

301

Exhibit 20.

(4) A prosecution of an offence under this section shall not be instituted except by or with the consent of the Attorney General:

302 Provided that the person charged with such an offence may be arrested and a warrant for his arrest may be issued and executed, and such person may be remanded in custody or on bail notwithstanding that the consent of the Attorney-General to the institution of the prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.

303 (5) Where an act constitutes an offence both under this Act and under any other Act, or both under this Act and at common law, the offender shall be liable to be prosecuted and punished under either this Act or such other Act, or under this Act or at Common Law, but shall not be liable to be punished twice for the same offence.

304 2.—(1) If a justice of the peace is satisfied, on information on oath laid on behalf of a Secretary of State or the Board of Trade, that there is reasonable ground for suspecting that an offence under this Act has been or is about to be committed by any person, firm or company, he may issue a warrant authorizing any person appointed by a Secretary of State or the Board of Trade and named in the warrant to inspect all books or documents belonging to or under the control of that person, firm or company and to require any person able to give any information with respect to the business or trade of that person, firm or company, to give that information, and if accompanied by a constable to enter and search any premises used in connection with the business or trade, and to seize any such books or documents as aforesaid:

Provided that when it appears to a Secretary of State or the Board of Trade that the case is one of great emergency and that in the interests of the State immediate action is necessary, a Secretary of State or the Board of Trade may, by written order, give to a person appointed by him or them the like authority as may be given by a warrant of a justice under this sub-section.

(2) Where it appears to the Board of Trade— 306

(a) in the case of a firm, that one of the partners in the firm was immediately before or at the time since the commencement of the present war a subject of, or resident or carrying on business in, a State for the time being at war with His Majesty; or

(b) in the case of a company, that one-third or more of the issued share capital or 307
of the directorate of the company immediately before or at any time since the commencement of the present war was held by or on behalf of or consisted of persons who were subjects of, or resident or carrying on business in, a State for the time being at war with His Majesty; or

(c) in the case of a person, firm, or com- 308
pany, that the person was or is, or the firm or company were or are acting as agents for any person, firm or company trading or carrying on business in a State for the time being at war with His Majesty;

the Board of Trade may if they think it expedient for the purpose of satisfying themselves

that the person, firm, or company are not trading with the enemy, by written order, give to a person appointed by them, without any warrant from a justice, authority to inspect all books and documents belonging to or under the control of the person, firm or company, and to require any person able to give information with respect to the business or trade of that person, firm, or
310 company, to give that information.

For the purposes of this sub-section, any person authorized in that behalf by the Board of Trade may inspect the register of members of a company at any time, and any shares in a company for which share warrants to bearer have been issued shall not be reckoned as part of the issued share capital of the company.

(3) If any person having the custody of any
311 book or document which a person is authorized to inspect under this section refuses or wilfully neglects to produce it for inspection, or if any person who is able to give any information which may be required to be given under this section refuses or wilfully neglects when required to give that information, that person shall on conviction under the Summary Jurisdiction Acts be liable to imprisonment with or without hard labor for a term not exceeding six months or to
312 a fine not exceeding fifty pounds or to both such imprisonment and fine.

3. Where it appears to the Board of Trade in reference to any firm or company—

(a) that an offence under this Act has been or is likely to be committed in connection with the trade or business thereof;
or

- (b) that the control or management thereof has been or is likely to be so affected by state of war as to prejudice the effective continuance of its trade or business and that it is in the public interest that the trade or business should continue to be carried on;

the Board of Trade may apply to the High Court 314
for the appointment of a controller of the firm
or company, and the High Court shall have
power to appoint such a controller, for such
time and subject to such conditions and with
such powers as the Court thinks fit, and the
powers so conferred shall be either those of
a receiver and manager or those powers sub-
ject to such modifications, restrictions or exten-
sions as the Court thinks fit (including, if the 315
Court considers it necessary or expedient for
enabling the controller to borrow money, power,
after a special application to the Court for that
purpose, to create charges on the property of
the firm or company in priority to existing
charges).

The Court shall have power to direct how and
by whom the costs of any proceedings under this
section, and the remuneration, charges, and ex-
penses of the controller, shall be borne, and 316
shall have power, if it thinks fit, to charge such
costs, charges, and expenses to the property of
the firm or company, in such order of priority,
in relation to any existing charges thereon, as it
thinks fit.

4.—(1) This Act may be cited as the Trad-
ing with the Enemy Act, 1914.

317

Exhibit 20.

(2) In this Act the expression "Attorney-General" means the Attorney or Solicitor General for England, and as respects Scotland means the Lord Advocate, and as respects Ireland means the Attorney or Solicitor General for Ireland.

318

(3) In the application of this Act to Scotland the Secretary for Scotland shall be substituted for a Secretary of State, and the Court of Sessions shall be substituted for the High Court; the Court exercising summary jurisdiction shall be the sheriff court; references to a justice of the peace shall include references to the sheriff and to a burgh magistrate; and references to a receiver and manager shall be construed as references to a judicial factor.

319

(4) In the application of this Act to Ireland, the Lord Lieutenant shall be substituted for a Secretary of State.

(5) Anything authorized under this act to be done by the Board of Trade may be done by the President or a Secretary or Assistant Secretary of the Board, or any person authorized in that behalf by the President of the Board.

EXHIBIT 21.

320

Annual 1914.

BULLETIN OF IMPERIAL LAWS
FOR THE
KINGDOMS AND LANDS IN THE COUNCIL OF THE
EMPIRE.

Article CLIX—Issued and distributed on October 23-1914.

No. 1. Contents (No. 289-292). 289. Imperial order regarding measures of reprisals of juri-

dical and economic character on account of war conditions. 290. Regarding measures of reprisals on properties and claims of citizens of hostile States. 291. Regarding the prohibition of payments to England and France. 292. Regarding the supervision of foreign business establishments.

289.

322

IMPERIAL ORDER OF OCTOBER 16th, 1914, regarding measures of reprisals of juridical and economic character on account of war conditions.

By virtue of paragraph No. 14 of the State basic law of December 21, 1887, B. I. L. No. 141, I order as follows:

1.

The Government is authorized, on the strength 323
of the right of reprisals to issue orders and provisions of juridical and economic nature in regard to the treatment of foreigners or foreign business, and to take the necessary measures for preventing having any transactions, directly or indirectly, to hostile states.

2.

Any person who intentionally violates the provisions enacted by virtue of Section 1 will be punished with rigorous imprisonment of one month to one year. 324

In addition thereto a fine of Kr 50,000 may be imposed, which will go to the State treasury.

3.

The imperial order goes into effect on the day of its publication. The Minister of Interior and

325

Exhibit 22.

the other Ministers interested are charged with the enforcement of this order.

Vienna, October 16, 1914.

326

Sturgkh m.p.

Hochenburger m.p.

Forster m.p.

Trnka m.p.

Zenker m.p.

Franz Josef m.p.

Georgi m.p.

Heinold m.p.

Hussarek m.p.

Schuster m.p.

Engel m.p.

Morawski m.p.

EXHIBIT 22.

290.

327 *Joint Ministry's General Order of October 22, 1914. Regarding measures of reprisals on credits and claims of citizens of hostile states.*

By virtue of Section 1 of the Imperial Order of October 16, 1914, B. I. L. No. 289 it is ordered as follows:

1.

328 By virtue of the right of reprisals there may be prohibited the satisfaction of demands which citizens of hostile states have on credits and claims against firms, individuals, public service corporations, or other corporations doing business in this country, or the payment of such claims may be made dependent on the performance of special conditions. Furthermore it may be ordered that whatever is due be deposited until further notice with the Austro-Hungarian Bank, the Postal Savings Bank, or other suitable places.

Exhibit 23.

329

2.

Beginning with the day on which this order goes into effect, all interests within this country, individuals, public service and other corporations may be compelled by the Government to state the credits and debits they have of the kind enumerated in Section 1.

This order goes into effect on the day of its publication. 330

	Franz Josef m.p.
Sturgkh m.p.	Georgi m.p.
Hochenburger m.p.	Heinold m.p.
Forster m.p.	Hussarek m.p.
Trnka m.p.	Schuster m.p.
Zenker m.p.	Engel m.p.

Morawski m.p.

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EXHIBIT 23.

291.

Joint Ministry's General Order of October 22, 1914. Regarding the prohibition of payments to England and France. As provided in Section 1 of the imperial order of October 16, 1914. B. I. L. No. 289 regarding measures of reprisals of 332
juridical and economic nature on account of war conditions, it is ordered as follows:

1.

It is prohibited till further order to make payments, directly or indirectly, in cash, notes or checks, orders or otherwise to citizens of great Britain and Ireland, of British colonies and pos-

333

Exhibit 23.

sessions, likewise of France and its colonies, as well as to persons domiciled in those territories, or directly or indirectly to remit to these countries any moneys or other securities.

334 This prohibition applies especially to any person who may have acquired the right to payment after the 13th of August, 1914, or if living within this country after this order has gone into effect.

2.

With regard to notes and checks to which this prohibition applies the time within which to pay, to present for payment and protest are extended until further order.

3.

335 The provisions of Section 1 and Section 2 do not apply to payments within this country to citizens of the states mentioned in Section 1, who are living here, and further do not apply to the performance to be made within this country of obligations arising in favor of citizens of the above mentioned states in the cause of the business of their branches established within this country.

336 It is permitted to make relief remittances to subjects of the Austro-Hungarian monarchy.

4.

The Ministry of Finance, in accord with other Ministries interested may grant exceptions to the prohibition provided in Section 1.

5.

While this prohibition is in force no interest can be claimed for delay of payments.

Exhibit 24.

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6.

A debtor can free himself of his obligations by depositing the moneys or securities due, with the Austro-Hungarian Bank, or the Postal Savings Bank.

7.

Fulfillment of obligations contrary to these prohibitions are subject to the penalties provided for in Section 2 of the Imperial Order of October 16, 1914, B. I. L. 289. 338

8.

This order goes into effect on the day when published.

Sturgkh m.p.

Georgi m.p.

Hochenburger m.p.

Heinold m.p.

Forster m.p.

Hussarek m.p. 339

Trnka m.p.

Schuster m.p.

Zenker m.p.

Engel m.p.

Morawski m.p.

 EXHIBIT 24.

Order of the Joint Ministries dated October 22, 1914. Regarding the supervision of foreign business establishments. 340

In accordance with Section 1 of the Imperial Order of October 16, 1914, B. I. L. 289 it is ordered as follows:

1.

For business establishments, or for branches of business establishments, transacting business within the country subject to this order, which

341

Exhibit 24.

are managed or controlled from foreign hostile states, as well as for business establishments whose profits in whole or in part are to be turned over to the latter states there may be appointed at the expense of such establishments trustees who have to guard the property and look after private rights of the establishment and to watch that during the war their business is conducted in such a manner as not to be contrary to the interests of this country.

2.

Trustees appointed to supervise such establishments are specially authorized:

1. To demand information on any business matters.
2. To inspect books and correspondence of the business, as well as to investigate securities and merchandises on hand.
3. To forbid any measures taken in the management of the business especially in regard to dispositions of values and communications regarding commercial matters.

3.

The managers and employees of the establishment must follow the orders and instructions given by the person placed in control of the business.

4.

Moneys or other assets of the establishment placed under control cannot be sent or applied directly or indirectly to foreign hostile countries.

Exhibit 25.

345

Persons in control can grant exceptions. In suitable cases they may order that moneys or other securities whose remittance is forbidden as per above Section 1 might be deposited with the Austro-Hungarian Bank or with the Postal Savings Bank for account of the persons entitled to them.

5.

346

This order goes into effect on the day when published.

Sturgkh m.p.

Georgi m.p.

Hochenburger m.p.

Heinold m.p.

Forster m.p.

Hussarek m.p.

Trnka m.p.

Schuster m.p.

Zenker m.p.

Engel m.p.

Morawski m.p.

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EXHIBIT 25.

AUSTRO-AMERICANA.

Trieste, 19th Sept. 1914.

Messrs. Watts, Watts & Co., Ltd., Foreign Coal-
ing Dept.,

7 Whittington Avenue, Leadenhall Street,
London, E. C.

348

Dear Sirs:

We have accepted several drafts for Bunker Coal supplied to our ships, which, failing advice from our London Bankers, seem not to have been paid up to now. The whole amount of the drafts accepted with payment due up to September 29th, 1914 is:

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Exhibit 25.

Lst. 8,641.9.9.

Of course, it goes without saying, that we wish to confirm our liabilities for the payment of these amounts.

The legal dispositions taken by the British and Austrian Government (Moratoria) prevent us, however, to fulfill our original undertaking.

350 We beg, therefore, to ask you to wait for the payment until normal circumstances will enable us to square our account, eventually to ask you for a suggestion how you would propose to settle this matter, or f. i. whether you would accept a guarantee of one of our first class Bankers in Vienna, viz: Wiener Bank Verein, K. K. Priv. Oesterr. Kreditanstalt Fuer Handel & Gewerbe, priv. ost. K. K. Laenderbank, K. K. Priv. Oesterr: Bodenkreditanstalt.

351 Awaiting your reply, we are, dear Sirs,

Yours very truly,

Unione Austriaca di
Navigazione gia
Austro-Americana & Fratelli

352

TRIAL EXHIBIT 2.

353

The following cases were offered by the libellant in proof English law as Exhibit No. 2:

Orenstein v. Egyptian Phosphate Co., Ltd.
Court of Sessions, 1st Div. November 6, 1914,
reported in Trotter's on Law of Contract During
War.

Robinson v. Continental Ins. Co. of Mannheim,
31 T. L. Rep. p. 20, October 14-16, 1914 (1915)
1 K. B. 155. Also reported in Trotter's on Law 354
of Contract During War.

Schmidt v. Van der Veen, 31 T. L. Rep. 214.

In re Mary Duchess of Sutherland, 31 T. L.
Rep. 248.

Wilson v. Ragosine & Co., Ltd., 31 T. L. Rep.
264.

*Leader, Plunkett & Leader v. Direction der
Disconto Gesellschaft,* 31 T. L. Rep. 63, Novem-
ber 26, 1914. Also reported in Trotter's on 355
Law of Contract During War p. 453, November
26th.

Cooper & Co. v. Deutsche Bank of Berlin,
Glasgow, Sheriff's Court, November 20, 1914.
Reported in Trotter's on Law of Contract Dur-
ing War, p. 451.

Ingle v. Continental Ins. Co. of Mannheim, 31
T. L. Rep. 41, October 19-29, 1914. King's Bench
Division (1915) 1 K. B. 227.

356

Fox & Co. v. Schrempt & Bonke, Nov. 19, 1914,
Reported in The Times, November 19, 1914, and
in Trotter's on Law of Contract During War, p.
432.

The Moewe, 1915 Probate 1, holding enemy
alien no status in Prize Court unless invoking
rules of Hague Convention.

357

*Exhibit 2.**Potter v. Freundenderberg.*

In the Court of Appeal, reported in Trotter's
on Law of Contract During War, p. 454.

Several other cases reported by Trotter on pp.
455, 457.

Esposito v. Bowden, 7 E. & B. 763.*Reed v. Hoskins*, 6 E. & B. 956.*Alcinous v. Nigrew*, 4 E. & B. 217.

358

Marcus & Co. v. Credit Lyonnais, 12 Q. B. D.
589

Alien enemies subject to suit in this country
also.

McVeigh v. U. S., 11 Wall 259.*Dorsey v. Kyle* (1869) 96 Am. Dec. 617.

Enemy can defend in usual manner.

Luss v. Mitchell, 11 Fla. 80.*Seymour v. Bailey*, 66 Ill. 288.

359 [Endorsed:]—U. S. Dist. Court—E. D. of N. Y.—
Watts v. Austro Am. Line—Exhibit 2—
March 27, 1915—Percy G. B. Gilkes, Clerk.

360

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

WATTS, WATTS & COMPANY, LTD.,

Libelant

vs.

UNIONE AUSTRIACA DI NAVIGAZIONE,
etc.*Respondent.*

Opinion.

362

This is a libel brought by Watts, Watts & Co., Ltd., an English corporation, against the Unione Austriaca di Navigazione, etc., an Austrian corporation, to recover the sum of \$45,360, the contract price of bunker coal supplied by the libelant to the respondent's steamers at Algiers, a dependency of the French Republic, before the outbreak of war between England and Austria. Jurisdiction was obtained by a writ of foreign attachment of the respondent's steamer *Martha Washington*. 363

The parties have stipulated the following facts:

On Nov. 19, 1913, the parties entered into a contract according to which the libelant undertook to supply bunker coal required by respondent's steamers coaling en route. Payment was required "in cash at port of delivery or by due acceptance and payment of Captain's draft in sterling on owners at sixty days' sight payable in London." 364

Pursuant to contract coal was supplied by the libellant to respondent's steamers at Algiers, for which,

on the date of delivery, the captains of the several steamers drew drafts in sterling on the owners at sixty days' sight, payable in London. The following table itemizes the transaction:

	Date	Vessel	No. of tons	Amount	Draft due
	1914				
	May 29	<i>Martha Washington</i>	606	£734. 15. 6	Aug. 7/14
366	June 1	<i>Kaiser Franz Josef I</i>	781	946. 19. 3	" 11/14
	3	<i>Anna</i>	112	135. 16. 0	" 11/14
	5	<i>Oceania</i>	572	620. 16. 0	" 17/14
	9	<i>Gerty</i>	192	232. 16. 0	" 18/14
	15	<i>Argentina</i>	290	351. 12. 6	" 22/14
	18	<i>Kaiser Franz Josef I</i>	992	1202. 16. 0	" 27/14
	23	<i>Campania</i>	140	169. 15. 0	Sept. 1/14
	26	<i>Belvedere</i>	399	423. 3. 3	" 4/14
	28	<i>Martha Washington</i>		972. 8. 6	" 4/14
	July 3	<i>Argentina</i>	478	579. 11. 6	" 12/14
	6	<i>Oceania</i>	463	561. 7. 9	" 12/14
	13	<i>Kaiser Franz Josef I</i>	803	973. 12. 9	" 22/14
	23	<i>Martha Washington</i>	607	735. 19. 9	Oct. 1/14
				£8641. 9. 9	

- 367 The drafts were duly accepted as payable at Kais. Koen. Priv. Oesterreichische Laenderbank, in London, where the libellant thereafter caused them to be duly presented for payment. None of them was paid, and all were duly protested. On Aug. 4th Great Britain declared war against Germany and issued an aliens restriction order on the following day. The first draft fell due Aug. 7th; the reason given for failure to pay was, "Not sufficient cover." The
- 368 second and third drafts became payable on Aug. 11th. On Aug. 12th a state of war with Austria-Hungary was declared by Great Britain as from midnight of that day; and by a proclamation issued on that day the provisions of a previous proclamation of Aug. 5th prohibiting trade with the German Empire was extended to all commercial intercourse with Austria-Hungary. The notice of protest of these two drafts, dated Aug. 13th, recites that the premises of the

Laenderbank were found closed and the following notice posted: "Owing to the state of war, the business of the London branch of the Laenderbank is necessarily discontinued until its application to His Britannic Majesty's Government for a license to continue business has been granted." Both drafts were also endorsed by the bank "Insufficient funds." On or about Aug. 13th Sir William Plender was appointed controller of the London branch of the Laenderbank. The reason given for failure to pay the next seven drafts, falling due between Aug. 17th and Sept. 4th, as stated in the notices of protest, was: "We are instructed by Sir William Plender, the controller appointed by the British Government, not to make any payments at present." The answer given on presentation of the last four drafts was "No advice."

Meanwhile, on Aug. 24th this libel was filed, and on the following day process in personam with clause of foreign attachment issued out of this court.

The stipulation as to the facts embodies the following subsequent events:

By a supplemental proclamation, dated Sept. 9, 1914, Great Britain prohibited specifically, among other things, the payment of any sum of money to or for the benefit of an enemy, or giving security for the payment of any debt, or accepting, paying or otherwise dealing with any negotiable instrument, held by or on behalf of an enemy, with this proviso: "Nothing in this proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business, or being in our dominions, if such payments arise out of transactions entered into before the outbreak of war, or otherwise permitted."

The Trading With the Enemy Act, 1914, (4 & 5 Geo. V, c. 87) was enacted Sept. 18, in aid of the prior proclamations and fixed penalties for violation.

- On the part of Austria-Hungary, an Imperial Order of Oct. 16, 1914, authorized the Government to issue orders to prevent transactions, directly or indirectly, with hostile states, and three General Orders by the
- 374 Joint Ministry, dated Oct. 22nd, pursuant to such authority, prohibited payments, directly or indirectly, to citizens of Great Britain and France and their Colonies, and authorized the appointment of trustees to supervise business establishments within the country which are managed or controlled from such hostile states.

Finally, the respondent summarized the situation, from its own standpoint, in a letter written to the libellant from Trieste on Sept. 19th, wherein its liability for the

- 375 payment of the amount due was expressly confirmed:

"The legal dispositions taken by the British and Austrian Government prevent us, however, to fulfill our original undertaking. We beg, therefore, to ask you to wait for the payment until normal circumstances will enable us to square our account, eventually to ask you for a suggestion how you would propose to settle this matter, or f. i. whether you would accept a guarantee of one of our first class Bankers in Vienna."

- 376 CONVERS & KIRLIN (J. Parker Kirlin and John M. Woolsey of Counsel) for libellant.

LORENZO ULLO, for respondent.

VEEDER, J.:

It appears from the foregoing statement that drafts given by the Austrian respondent for coal supplied before the outbreak of war by the British libellant, payable at the Laenderbank, London, were not paid

when due because the respondent had not forwarded the funds to pay them with. The reason given by the respondent for its failure to supply the funds was that the state of war which had intervened made it impossible for the respondent to perform an obligation calling for payment to an alien enemy.

The embargo imposed by Sir William Plender, the controller in charge of the Laenderbank, upon the payment of funds by the bank, may be put aside. The respondent had not supplied the bank with funds. 378

Moreover, the libellant is not suing upon the drafts; when the libel was filed only six of the fourteen drafts had in fact become due. The libellant sues upon the original debt arising out of its performance of the contract.

The respondent's claim that the taking of drafts constituted a novation is without force. The contract between the parties expressly provided for "due acceptance and payment." The drafts were received by the libellant, not in satisfaction of the debt, but as conditional payment only. Such, indeed, would be the presumption of law in the absence of proof. For by the general commercial law a promise to pay, whether in the form of notes or bills, is not of itself the equivalent of payment. On principle nothing can be payment in fact save that which is such in truth, unless specially agreed to be taken as its equivalent. *The Emily Souder*, 17 Wall. 666. 379 380

I pass over various points argued by counsel to consider an issue which lies at the foundation of the case.

The respondent contends that this court, as a court of a neutral nation, should not exercise its jurisdictional power between alien belligerents to require an

act prohibited alike by the municipal law of both belligerents—*i. e.*, the transfer, by process of judgment and execution, of funds from one alien belligerent to the other. The status of a debt due from one belligerent to another is said to be that of property in the debtor's enemy country, and a neutral court may not disregard the state of war and by
 382 judicial action compulsorily change that status into a payable one. In other words, to take cognizance of this case would be a breach of neutrality.

To this argument the libellant replies that the contract made between the parties specified the place of performance, and it is necessary to consider only whether such performance by the respondent is legal according to the law of that place. And whether
 383 that place be Algiers or London it is clear that even after the outbreak of war, it was lawful for the libellant to receive, and for their alien enemy debtor to pay them, there the amount due; and if jurisdiction were obtainable there over the respondent the obligation could be enforced there by legal action. Whether such performance would involve a breach of Austrian law is immaterial to this inquiry, since Austria was not the place of payment and its law does not govern its legality.

384 So far as neutrality is concerned, how can it be a breach of neutrality for this court to decide controversies in accordance with the settled principles of maritime law, when regularly presented to it in accordance with recognized admiralty procedure? How can such enforcement here of legal rights between all belligerent subjects, irrespective of their enemy status abroad, be said to infringe that attitude of impartiality which lies at the foundation of neutrality?

The issue thus presented is one of great importance, and I regret to find that it must be decided without the aid of authority. The researches of learned counsel indicate that it is now presented for judicial determination for the first time.

The question is not one of jurisdiction, but of the propriety of the exercise of jurisdiction. This court's power is in no wise limited by the fact that other nations are at war. The jurisdiction of courts is part and parcel of the power inherent in the state by virtue of its sovereignty. The jurisdiction of the state within its own territory is necessarily exclusive and absolute. It is therefore susceptible of no limitation not imposed by itself; for any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in some other power. *The Schooner Exchange*, 7 Cr. 136. 386 387

But when parties foreign to a state come before its courts asking cognizance of obligations which arose and were to be performed outside that state, the exercise of jurisdiction is not obligatory; it is discretionary, with a view to the circumstances. *The Belgenland*, 114 U. S. 355; Benedict's *Admiralty*, Sec. 195. If jurisdiction is exercised, it is exercised as an act of international comity; if refused, the refusal does not arise out of any incapacity to act. Comity, therefore, is not a rule of law, but a rule of practice, convenience and expediency. While, however, it is not a matter of absolute obligation, it is something more than mere courtesy and good will. Where the parties are not only foreigners, but belong to different nations and have therefore no common forum, good 388

and sufficient reasons should appear to warrant a refusal to entertain the action.

When this libel was filed Great Britain and Austria-Hungary were at war. This fact affected materially the relations of the parties. The outbreak of war brings about *ipso facto* a radical change in the relations of noncombatant subjects as well as of the public
390 armed forces of the belligerent states.

Although numerous mitigations have blunted the severity of the old doctrine that a state of war placed the general population of the opposing nations in a condition of active hostility, the subjects of enemy states are still, to a very considerable extent, regarded as enemies. Non-combatants are, or usually have been in modern times, exempt from most of the severities of warfare; but they are by no means free to act as
391 if no war existed.

The law of nations, as judicially declared, prohibits all intercourse between citizens of the belligerents which is inconsistent with the state of war between their countries. No transaction injurious to their own government may be entered into or continued by them. Ordinary commercial intercourse is therefore incompatible with a state of war, since every act and contract which tends to increase the enemy's resources
392 is absolutely interdicted; and this includes every kind of trading or commercial dealing, whether by transmission of money or goods, or orders for the delivery of either, directly or indirectly, or by contracts in any form looking to or involving such transmission. Every such contract made during the war is illegal and void.

Since, however, aid to the enemy is the touchstone of illegality, discrimination is permitted in the case of contracts made before the outbreak of war. Further

performance which inures [to the aid of, or involves any dealing with, the enemy, is illegal. If from its character the contract is incapable of suspension, it is dissolved. But where such interruption of performance does not go to the root of the transaction, the contract is merely suspended during the war. The alien enemy is not *civiliter mortuus*; he is merely in a state of suspended animation. When the war ends the mutual obligations of performance and right of action revive. 394

Where, therefore, such a contract has been entered into with an alien enemy before the outbreak of war, and has been performed on his side, the war merely suspends his remedy; in other words, he cannot sue upon it during the existence of hostilities. If, on the other hand, performance of the contract is on the side of the other party, he can enforce the contract (particularly such as require for performance the payment of money 395 only) in the courts of his own country during the continuance of war, provided of course a cause of action has accrued.

The reason why the rule debarring action on the part of an alien enemy plaintiff can have no application where the parties are reversed, is plain. The rule is based upon the obvious ground that it is contrary to public policy for the courts of a belligerent country to render any assistance to an alien enemy to enforce 396 rights which, but for the war, he would be entitled to enforce to his own advantage and to the detriment of his enemy.

It is apparent, therefore, that to hold that a subject's right of action in his own country against an alien enemy is suspended, would be to defeat the very object of the suspensory rule, and to turn a disability into a relief. This is the municipal law of England. *Porter*

v. *Freundenburg*, 31 Times Law Repts., 163 (Jan. 19, 1915); *Robinson v. Continental Insurance Company of Mannheim* (1915) 1 K. B., 155; *Ingle v. Ib.*, 84 L. J., (K. B.) 491; *Leader, Plunkett & Leader v. Direction der Disconto Gesellschaft*, 31 Times Law Repts., 63; *Continental Tyre & Rubber Co., Ltd., v. Daimler Motor Co., Ltd.*, 31 Ib. 178; *In re Mary, Duchess of Sutherland*, 398 31 Ib., 248; *Janson v. Driefontein Consolidated Mines, Ltd.*, (1902) A. C., 484; *Alcinois v. Nigrew*, 4 E. & B. 217; *LeBret v. Papillon*, 4 East 502; *The Hoop*, 1 Chr. Rob. 196; *Ex parte Boussmaker*, 13 Vesey, Jr. 71; *Albrecht v. Sussman*, 2 Ves. & B. 323.

It is also the law of this country. *McVeigh v. United States*, 11 Wall., 259; *Hanger v. Abbott*, 6 Wall., 532; *The Julia*, 8 Cranch, 181; *United States v. Lane*, 8 Wall., 185; *Briggs v. United States*, 143 U. S., 346; 399 *Kershaw v. Kelset*, 100 Mass., 561; *Griswold v. Waddington*, 15 Johns., 57; *Whelan v. Cook*, 29 Md., 1.

And in the absence of proof of the foreign law, it may be taken to be the law of Austria-Hungary and of France. It is in fact the law common to all nations since it is merely a formulation of the instinct of self defense.

The apparently contradictory provision of the Hague Convention of 1907 concerning the Laws and Customs of War on Land, Art. 23 (h), whereby it is forbidden to declare extinguished, suspended, or unenforceable in a court of law the rights and rights of action of the national of the adverse party, has been construed by the English Court of Appeals to mean, in accordance with its context, merely that the military commander of a belligerent force in the occupation of the enemy's territory is forbidden to make any declaration preventing the inhabitants from using 400

their courts to assert their civil rights. *Porter v. Freudenburg*, 31 Times Law Repts., 163.

The proclamations and orders in evidence are, therefore, merely declaratory of the common law.

Such being the law common to the belligerents and to neutral forum, it seems clear to me that it should be recognized and applied in this situation. It is quite beside the point to rely, as the libellant 402 does, upon the fact that the libellant could enforce this payment in England if it could find the respondent or any of its property there. That recourse would be available to it under such circumstances as a particular application of the general rule looking to the impairment of the resources of the alien enemy. But it is because the libellant finds it impossible to reach the respondent or its property in England that it has applied to this forum. 403

From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries forbids a payment by one belligerent subject to his enemy during the continuance of war. This court, in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it.

The libel is dismissed, without prejudice.

May 20, 1915.

405

At a Stated Term of the United States
District Court, for the Eastern
District of New York, held in
the Post Office Building, Bor-
ough of Brooklyn, City of New
York, on the 27th day of May,
1915.

Present—HONORABLE VAN VECHTEN VEEDER,
United States District Judge.

406

WATTS, WATTS & COMPANY, LIMITED,
Libelant,

AGAINST

UNIONE AUSTRIACA DI NAVIGAZIONE,
ETC.,
Respondent.

Final
Decree.

407

This cause having come on to be heard on the
leadings and proofs adduced by the respective
parties and having been argued by their respec-
tive advocates, and due deliberation having been
had herein, and the Court on May 20, 1915, hav-
ing announced its decision that the libel should
be dismissed, without prejudice, Now, on mo-
tion of Lorenzo Ullo, proctor for the respondent
herein, it is hereby

408

Ordered, adjudged and decreed that the libel
herein be and it hereby is dismissed, without pre-
judice.

VAN VECHTEN VEEDER,
U. S. D. J.

Notice of settlement of the above decree is here-
by waived.

CONVERS & KIRLIN,
Proctors for Libelant.
LORENZO ULLO,
Proctors for Respondent.

UNITED STATES DISTRICT COURT, 409
EASTERN DISTRICT OF NEW YORK.

WATTS, WATTS & COMPANY, LIMITED,
Libelant,

AGAINST

UNIONE AUSTRIACA DI NAVIGAZIONE,
ETC.,
Respondent.

Notice of
Appeal.

410

Sirs:

Please take notice, that the libelant herein, Watts, Watts & Company, Limited, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree 411 made and entered herein on the 27th day of May, 1915, and from each and every part thereof.

Dated, New York, May 27th, 1915.

Yours, &c.,

CONVERS & KIRLIN,
Proctors for Libelant.

To:

PERCY GILKES, Esq.,
Clerk.

412

LORENZO ULLO, Esq.,
Proctor for Respondent.

413 UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

414	<p>WATTS, WATTS & COMPANY, LIMITED, Libelant,</p> <p style="text-align: center;">AGAINST</p> <p>UNIONE AUSTRIACA DI NAVIGAZIONE, ETC., Respondent.</p>	}	<p>Assign- ments of Error.</p>
-----	--	---	--

Watts, Watts & Company, Limited, the respondent, hereby assigns error to the rulings and proceedings herein and the final decision and decree of the United States District Court for the Eastern District of New York herein, made and entered on the 27th day of May, 1915, as follows:

1. In that the District Court did not sustain the libel and permit the recovery by the libelant of the full sum therein claimed, with interest from the dates on which the coal was furnished to the several steamers of the respondent.
2. In that the District Court, in effect, refused to take jurisdiction of the case, when it had jurisdiction to hear and adjudicate the case on the merits.

3. In that the District Court dismissed the libel.

CONVERS & KIRLIN,
Proctors for Libelant,
Watts, Watts & Company, Ltd.

UNITED STATES DISTRICT COURT, 417

EASTERN DISTRICT OF NEW YORK.

WATTS, WATTS & COMPANY, LTD.,
Libelant,

AGAINST

UNIONE AUSTRIACA DI NAVIGATION,
Respondent.

Stipulation
Agreeing
on Record. 418

It is hereby stipulated and agreed, by and between the proctors for the parties in the case above mentioned, that the foregoing is a true transcript of the record in the said cases as agreed on by the parties, and that it may be certified by the Clerk of this Court to the Clerk of the Court of Appeals as the transcript of the record on appeal herein. 419

Dated, New York, June , 1915.

CONVERS & KIRLIN,
Proctors for Libelant.

LORENZO ULLO,
Proctor for Respondent.

420

421 UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

WATTS, WATTS & COMPANY, LTD.,
Libelant,

AGAINST

422 UNIONE AUSTRIACA DI NAVIGATION,
Respondent.

Clerk's
Certificate.

I, PERCY G. B. GILKES, Clerk of the District Court of the United States, for the Eastern District of New York, do hereby certify that the foregoing is a true transcript of the record of the District Court, in the above entitled cause, as
423 agreed on by stipulation between the proctors for the respective parties.

In Testimony Whereof, I have caused the seal of the said Court to be affixed at the City of New York, this day of June, in the year of our Lord, One thousand nine hundred and fifteen, and of the Independence of the United States, the one hundred and thirty-ninth.

424

(Seal)

.10 Revenue
Stamp Cancelled

PERCY G. B. GILKES,
Clerk.

UNITED STATES CIRCUIT COURT OF 425
APPEALS.

FOR THE SECOND CIRCUIT.

No. 67—OCTOBER TERM, 1915.

Argued November 19, 1915.

Decided December 14, 1915.

WATTS, WATTS & COMPANY, LTD.,
Libelant-Appellant,

vs.

UNIONE AUSTRIACA DI NAVIGAZIONE,
ETC.,
Respondent-Appellee.

Appeal from
the District
Court of the
United States
for the Eastern
District of New
York.

426

Before:
Lacombe, Coxe
and Ward,
Circuit Judges.

427

Appeal from decree of the District Court declining to take jurisdiction and dismissing the libel without prejudice.

PER CURIAM:

The libelant, a British corporation, supplied coal to the steamers of the respondent, an Austrian corporation, from time to time at Algiers, a French dependency. The master in each case drew a draft for the price of the coal to the order of the libelant payable at London. Of such drafts drawn during the months of May, June and July, 1914, and duly accepted payable in London, the first fell due August 7, and the last October 1. Great Britain declared war upon Austria-Hungary beginning from midnight August 12. Each sovereign pro-

428

429 hibited its citizens from paying any debt due an enemy during the continuance of the war. Payment of the drafts was refused by the accepting bank at London.

The libellant filed a libel *in personam* against the respondent, not upon the drafts, but to recover for the debt, and attached the steamer *Martha Washington*. The respondent does not deny its obligation to pay.

430 Judge Veeder in the District Court, feeling that it was inexpedient under these circumstances to take jurisdiction of the controversy, dismissed the libel without prejudice. Whether to take or decline jurisdiction was a matter within his discretion, see the *Belgenland*, 114 U. S., 355; Benedict on Admiralty, sec. 195, and as no abuse of discretion appears, the decree is affirmed.

431 J. P. Kirlin for the Appellant.
C. S. Haight for the Appellee.

At a Stated Term of the United **433**
 States Circuit Court of Ap-
 peals, in and for the Second
 Circuit, held at the Court
 Rooms in the Post Office
 Building in the City of New
 York, on the 24th day of
 December, one thousand nine
 hundred and fifteen.

Present:—HON. E. HENRY LACOMBE,
 HON. ALFRED C. COXE,
 HON. HENRY G. WARD.

434

Circuit Judges.

WATTS, WATTS & COMPANY,
 Libelant-Appellant,

vs.

435

UNIONE AUSTRIACA DI NAVIGAZIONE,
 ETC.,
 Respondent-Appellee.

Appeal from the District Court of the United
 States for the Eastern District of New York.

This cause came on to be heard on the tran-
 script of record from the District Court of the **436**
 United States, for the Eastern District of New
 York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby
 ordered adjudged and decreed that the decree
 of said District Court be and it hereby is af-
 firmed with costs.

E. H. L.

437 It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[Endorsed:]-United States Circuit Court of Appeals, Second Circuit.—Watts, Watts & Co., vs. Unione Austriaca, etc.—Order for Mandate—United States Circuit Court of Appeals Second Circuit.—Filed Dec. 24, 1915, William Parkin, Clerk.

438

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit do hereby Certify that the foregoing pages, numbered from 1 to 110 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Watts, Watts & Company, Ltd., against Unione Austriaca di Navigazione, etc., as the same remain of record and on file in my office.

439

440

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of January in the year of our Lord One Thousand Nine Hundred and Sixteen and of the Independence of the said United States the One Hundred and fortieth.

[Seal]

[Revenue Stamp]

WM. PARKIN,
Clerk.

FILED
JUN 1 1916
JAMES D. MAHER
CLERK

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1915.

No. 103 31 28

WATTS, WATTS & COMPANY, LIMITED,
An English Corporation,

Libelant-Petitioner,

vs.

UNIONE AUSTRIACA DI NAVIGAZIONE, ETC.,
An Austrian Corporation,

Respondent.

*Plaintiff and Defendant in the District Court of Appeals for the
Second Circuit.*

J. FRANK KEMER,

JOHN M. WOLFE,

Counsel for Petitioner.

United States Supreme Court.

WATTS, WATTS & COMPANY,
LIMITED, an English Cor-
poration,

Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVI-
GAZIONE, etc.,
Respondent.

OCTOBER TERM,

1915.

No.

SIRS:

PLEASE TAKE NOTICE that on Monday, June 5
1916, at the opening of court on that day or so
soon thereafter as counsel can be heard, we shall
make a motion before the Supreme Court of the
United States

a. For leave to file the petition for writ of man-
damus hereto annexed, and that a rule be entered
and issued directing the Honorable Alfred C.
Coxe, the Honorable Henry G. Ward, the
Honorable Henry W. Rogers, United States
Circuit Judges for the Second Circuit, and the

Honorable Julius M. Mayer, United States District Judge sitting in this cause in the Circuit Court of Appeals for the Second Circuit and the said Circuit Court of Appeals for the Second Circuit, and the Honorable Van Vechten Veeder, United States District Judge for the Eastern District of New York, sitting in the said District and the said District Court for the Eastern District of New York, to show cause why a writ of mandamus should not be issued against them and each of them in accordance with the prayer of the petition;

b. That in the alternative a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Second Circuit;

c. That the Court grant the petitioner such other and further relief in the premises as may be just.

Yours, etc.,

KIRLIN, WOOLSEY & HICKOX,
Proctors for Petitioner.

TO HAIGHT, SANDFORD & SMITH,
Proctors for Respondent.

UNITED STATES SUPREME COURT.

WATTS, WATTS & COMPANY,
LIMITED, AN ENGLISH COR-
PORATION,

Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVI-
GAZIONE,

Respondent.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

Watts, Watts & Co., Ltd., a corporation of
Kingdom of Great Britain and Ireland, respect-
fully shows to this Honorable Court as follows:

1. This is a petition for a writ of mandamus
that a rule be entered and issued directing the
Honorable Alfred C. Coxe, the Honorable Henry
G. Ward, the Honorable Henry W. Rogers,
United States Circuit Judges for the Second Cir-
cuit, and the Honorable Julius M. Mayer, United
States District Judge sitting in this cause in the
Circuit Court of Appeals for the Second Circuit,
and said Circuit Court of Appeals for the Second
Circuit, and the Honorable Van Vechten Vechter

United States District Judge for the Eastern District of New York, sitting in said District, and the said District Court for the Eastern District of New York, to show cause why a writ of mandamus should not issue against them and each of them and why the prayer of this petition should not be granted.

In the alternative this petitioner prays for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit.

II. *The Pleadings.*

The libel was brought by Watts, Watts & Company, Limited, an English corporation, against the Unione Austriaca di Navigazione, an Austrian corporation, to recover the sum of \$45,360, the agreed and reasonable price of bunker coals furnished by the libellant to the respondent's steamers at Algiers, a dependency of the French Republic, before the outbreak of war between England and Austria. Libel, fols. 5 to 11.

Jurisdiction of the respondent here was obtained by writ of foreign attachment against the respondent's steamer *Martha Washington*. This attachment has not yet been vacated by the filing of a bond and the said steamer is still lying at New York subject to said writ.

The respondent appeared generally and filed an alleged answer to the libel.

The answer, however, is not responsive to the libel. It admits that there was a contract under which coal was furnished, but does not specifically admit or deny the allegations of the libel. It merely states that the respondent puts the libellant to its proof as to the terms of the contract and as to the fact that the coal was furnished, as alleged in the libel. Answer, fols. 20-23.

Article Fifth of the libel contained the allegation that the premises of the libel were true and within the Admiralty and Maritime Jurisdiction of the District Court. Fols. 10-11.

The Answer admits this jurisdiction. Fols. 23-24.

The prayer of the Answer is peculiar. It is as follows :

"WHEREFORE, respondent prays that judgment be rendered in the premises in accordance with the allegations and proofs which shall be submitted by libellant, and in default thereof that the libel be dismissed with costs." Fol. 24.

There is not anywhere in the Answer any objection to the jurisdiction of the Court. Apparently it was put in with the purpose of causing delay by insisting on proof of what should have been admitted.

III. *The Proofs.*

A stipulation as to facts and as to the method of proving foreign law was agreed on between

the parties, and will be found between folios 29 and 70, pages 8 to 18, of the record. The various exhibits annexed to the stipulation are printed in the following pages.

At the trial, in addition to the stipulation, which was offered by the libelant as Trial Exhibit No. 1, the libelant proved the English law applicable by submitting as Trial Exhibit No. 2 list of certain English cases, folios 353 to 359, in pursuance of the leave granted in paragraph 13 of the stipulation. Fol. 68.

The contract in pursuance of which the coal was furnished was annexed to the stipulation as Exhibit 1. Fols. 73 to 83.

The provision of the contract with regard to payment for the coal is as follows:

"Payment to be in cash at port of delivery or by due acceptance and payment of Captain's Draft in Sterling on owners at sixty days' sight payable in London; and in the event of failure of honour of any draft under this or any other Contract or Contracts for coals and/or necessities, this and any similar Contracts in force with the sellers as principals or agents shall be subject to cancelment by sellers." Fols. 76, 77.

The respondent did not pay cash for the coal, but, instead, the captains of the several vessels drew drafts in sterling on the owners of steamers at sixty days' sight, payable in London, for the price of the coal, and these drafts were duly ac-

cepted by the respondent as payable at Kais. Koen. Priv. Oesterreichische Laenderbank, in London. Fols. 36 to 37. This bank was a banking institution organized under the laws of Austria, which at the outbreak of the war had a branch doing business in London. Fol. 42.

The transaction is conveniently and correctly summarized by Judge Veeder in a table given in his opinion. Fols. 365 to 366, page 92.

The amount due as there given is £8,641:9:9. In addition there are some small items for the cost of protesting the drafts, which have been stipulated in by the parties, fols. 38-39, and which amount in all to £8:3:6, making the libellant's total claim £8,649:13:3 with interest.

None of the drafts was honored. Fols. 65 to 66. The facts with regard to the dishonor are correctly stated by Judge Veeder in his opinion. Fols. 367 to 370. These facts were shown in order to establish that the method of liquidation of the account which had been selected by the respondent had not resulted in payment.

The libellant as Judge Veeder found, fol. 378, is not suing on the drafts, but on the original debt arising out of its performance of its contract by the furnishing of coal to the respondent's vessels on the dates shown in Section 6 of the Stipulation. Fols. 34-35.

The respondent admitted its liability for the payment of the sum of £8,641:9:9 in a letter dated

September 19, 1914, addressed by it to the libelant. In that letter it writes as follows, fols. 348-349:

"We have accepted several drafts for Bunker Coal supplied to our ships, which, failing advice from our London Bankers, seem not to have been paid up to now. The whole amount of the drafts accepted with payment due up to September 29th, 1914, is:

"Lst. 8,641.9.9.

"Of course, it goes without saying, that we wish to confirm our liabilities for the payment of these amounts.

"The legal dispositions taken by the British and Austrian Government (Moratoria) prevent us, however, to fulfill our original undertaking."

The situation, therefore, is that the libelant came into the District Court here with a claim in respect of which the respondent in its sworn answer has admitted the District Court's jurisdiction, and which the proofs show to be due.

IV. Judge Veeder, whose opinion is reported 224 Fed. 188, found that the libel was based on the original debt arising out of the libelant's performance of the contract, fol. 368, and that the taking of the drafts did not constitute a payment, as was claimed by the respondent's counsel, fols. 379 to 380. He even stated that he had taken jurisdiction of the case, fols. 385, 403; but, after a consideration of the laws of Great Britain and

Austria-Hungary respectively, which under somewhat different terms prohibit intercourse between their respective subjects during the continuance of the state of war, held that the claim is not enforceable in our courts. He summarizes the situation as he finds it thus:

“From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries forbids a payment by one belligerent subject to his enemy during the continuance of war. This court in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it.” Fol. 403.

Consequently the libel was ordered dismissed without prejudice, and a decree entered accordingly. Fols. 404-408.

The libellant appealed to the Circuit Court of Appeals for the Second Circuit, assigning as error that the District Court did not allow the claim with interest from the dates on which the coal was furnished to the several steamers, but in effect refused to hear and adjudicate the case on the merits when it admittedly had jurisdiction to do so. Fols. 414 to 416.

The Circuit Court of Appeals for the Second Circuit affirmed the decision of the District Court in the following *per curiam* opinion, fols. 427-431:

“The Libellant, a British corporation, supplied coal to the steamers of the respondent, an Aus-

trial corporation, from time to time at Algiers, a French dependency. The master in each case drew a draft for the price of the coal to the order of the libellant payable at London. Of such drafts drawn during the months of May, June and July, 1914, and duly accepted payable in London, the first fell due August 7 and the last October 1. Great Britain declared war upon Austro-Hungary beginning from midnight August 12. Each sovereign prohibited its citizens from paying any debt due an enemy during the continuance of the war. Payment of the drafts was refused by the accepting bank at London.

"The libellant filed a libel *in personam* against the respondent, not upon the drafts, but to recover for the debt, and attached the steamer *Martha Washington*. *The respondent does not deny its obligation to pay.*

'Judge Veeder in the District Court, feeling that it was inexpedient under these circumstances to take jurisdiction of the controversy, dismissed the libel without prejudice. Whether to take or to decline jurisdiction was a matter within his discretion, see *The Belgenland*, 114 U. S. 355; *Benedict on Admiralty*, Sec. 195, and as no abuse of discretion appears, the decree is affirmed."

V. The petitioner is informed and believes that this case involves questions of great gravity, novelty and importance in our general jurisprudence as well as in the domain of private international law, and the petitioner is informed by its proctors that, to their knowledge, there are pending, in several of the District Courts of the United States

and in the Courts of several different States, many other cases involving, as this case does, the question of the right of a subject of one belligerent nation to bring suit against the subject of an enemy nation in our Courts.

VI. It is, therefore, of the highest importance that this Court should definitely pronounce on the jurisdiction of the Courts of the United States in matters of this kind in order that the principles to be followed may be definite and certain, and the important considerations involved shall not be left, as the Court of Appeals has left them, to the individual discretion of the Judges of the District Courts.

VII. The petitioner has filed herewith a certified copy of the record and all proceedings of the Court of Appeals and prays, if the writs of mandamus herein asked be not granted, that the said records and proceedings may be reviewed by this Court.

WHEREFORE, your petitioner prays:

(a) That a rule be made and issue from this Honorable Court directing the Honorable Van Vechten Veeder, District Judge of the United States, for the Eastern District of New York, sitting in said District, and the said District Court for the Eastern District of New York, and the

Honorable Alfred C. Coxe, the Honorable Henry G. Ward, the Honorable Henry W. Rogers, United States Circuit Judges for the Second Circuit, and to the Honorable Julius M. Mayer, United States District Judge, sitting in this cause in the Circuit Court of Appeals for Second Circuit, and to said Circuit Court of Appeals for Second Circuit, and each of them, to show cause why a writ of mandamus should not issue, commanding said Judges and said Courts, and each of them, to take jurisdiction of this cause and determine it on its merits, and

(b) That a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Second Circuit, commanding the said Court to certify and send to this Court on a day to be designated in said writ, a full and certified transcript of the record and of all proceedings of the said Circuit Court of Appeals in the said case, in the said Court, entitled *Watts, Watts & Company, Limited, v. Unione Austriaca di Navigazione*, etc., to the end that the said case may be reviewed and determined by this Court, as provided in Section 6, Act of Congress, entitled "An Act to establish Circuit Court Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes, approved March 3, 1891" and

Sections 240, 250, 251 of the Judicial Code, and that the decision or decree affirming the decree of the District Court and dismissing the libel without prejudice may be reviewed and reversed, and

(c) That your petitioner may have such other or further relief and remedy in the premises as to this Court may seem proper and in conformity with the laws of the United States, and your petitioner will ever pray.

WATTS, WATTS & COMPANY, LTD.,

Petitioner.

By KIRLIN, WOOLSEY & HICKOX,

Proctors for Petitioner.

J. PARKER KIRLIN,

JOHN M. WOOLSEY,

Counsel for Petitioner.

STATE OF NEW YORK, }
County of New York, } ss.:

JOHN M. WOOLSEY, being duly sworn, says:

I am a member of the firm of Kirlin, Woolsey & Hickox, proctors for the petitioner herein.

I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

The reason why this verification is not made by the petitioner is that it is a foreign corporation, and the reason that it is not made by one

of its officers is that none of them is within the United States.

This application is made in good faith and not for the purpose of delay.

JOHN M. WOOLSEY.

Sworn to before me this 18th }
day of May, 1916.

Charles Keating

Notary Public,

New York County, No. 33

I DO HEREBY CERTIFY that I have examined the foregoing petition and that, in my opinion, it is well founded and entitled to the favorable consideration of this Court.

J. PARKER KIRLIN.

37

FILED
JUN 1 1915
JAMES H. HANE
CL

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1915.

No. 10 8 18

WATTS, WATTS & COMPANY, LIMITED,
An English Corporation.

Plaintiff-Petitioner.

against

UNIONE AUSTRIACA DI NAVIGAZIONE, ETC.,
An Austrian Corporation.

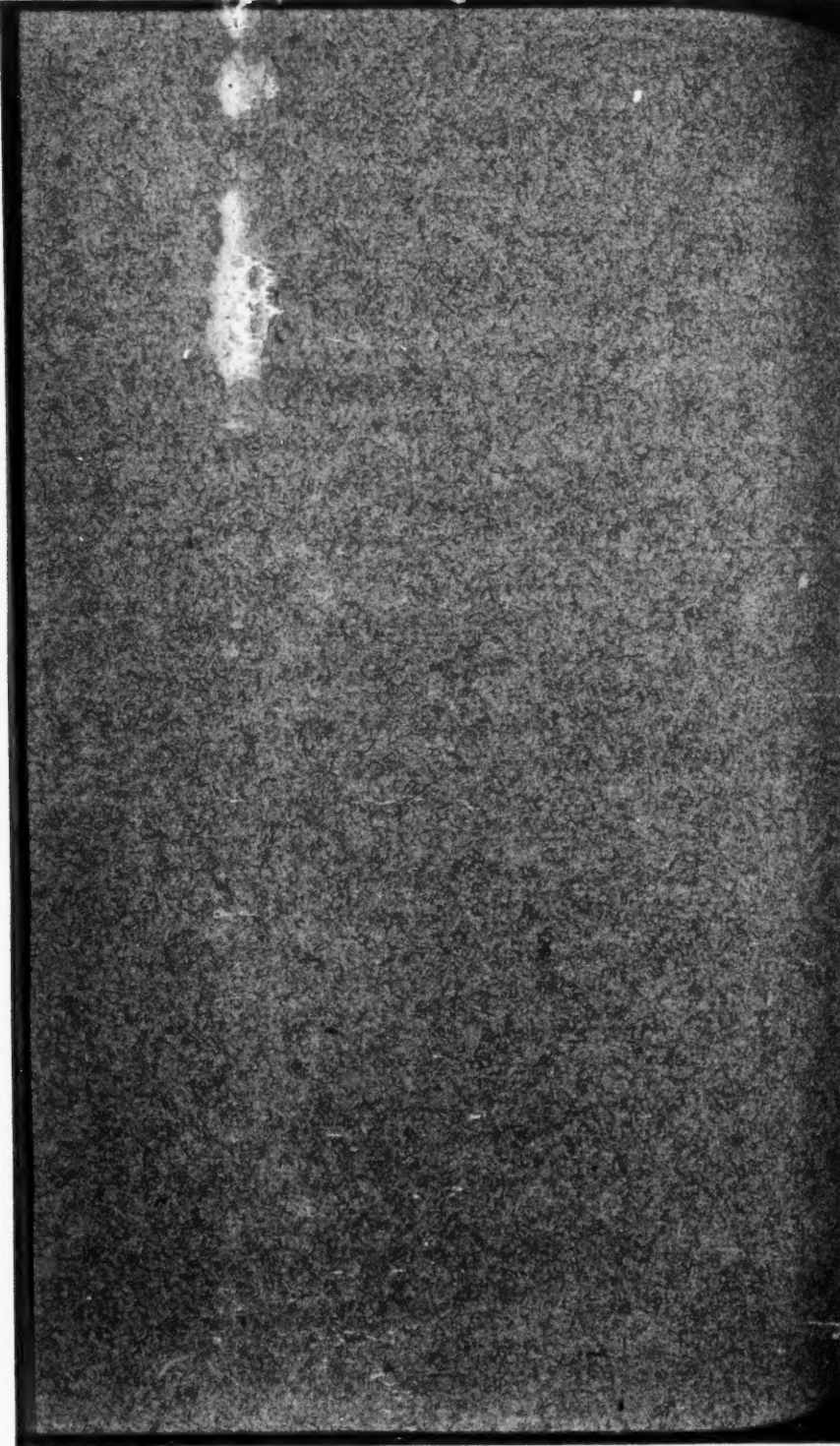
Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR A WRIT
OF HABEAS CORPUS AND IN THE ALTERNATIVE
FOR A WRIT OF CERTIORARI.

J. PARKER KIRKPATRICK

JOHN M. WOOLSEY

Counsel for Petitioner.



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UNITED STATES SUPREME COURT.

WATTS, WATTS & COMPANY,
LIMITED, an English corporation,

Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVI-
GAZIONE,

Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR A WRIT OF MANDAMUS AND IN THE ALTERNATIVE FOR A WRIT OF CERTIORARI.

The facts are fully set forth in the petition with which this brief is submitted.

This Court is not asked by this petitioner to pass on any issue of fact.

There is not any issue of fact in the case. The indebtedness and the jurisdiction of the Court were admitted by the respondent.

There are novel, interesting and important questions of law raised in the case.

This Court is asked to decide whether the District Judge of the United States District Court before whom the parties joined issue, without any objection to the jurisdiction on the part of the respondent, was not bound to adjudicate the issues raised on the proofs given.

The Court is also asked to decide whether the Circuit Court of Appeals was not also bound to hear and determine the issues in this case, owing to the fact that an appeal in Admiralty is held to be a trial *de novo*.

The question on which the courts were, according to the petitioner's contention, bound to adjudicate and should have decided in the libellant's favor is whether or not a British subject is entitled to maintain against an Austrian subject in this neutral jurisdiction, an action for the purchase price of coals furnished to Austrian steamers before the war between Austria and Great Britain, when the Austrian subject has entered a general appearance, and admitted that the claim is just and valid, placing its sole defence on an Austrian prohibition against trading with enemy subjects.

The remedy sought in the petition is alternative, either a mandamus to the courts and judges below directing them to adjudicate the issues raised in the case, or a *writ of certiorari* to the Circuit Court of Appeals for the Second Circuit so that this Court may itself determine the issues of law raised herein.

FIRST POINT.

THE COURTS BELOW SHOULD NOT HAVE DECLINED TO ADJUDICATE THIS CASE.

a. *The obligation sued on is peculiarly of admiralty cognizance.*

The obligation to pay for the coal furnished the various ships of the respondent at a foreign port was complete before the outbreak of the war between England and Austria.

The action is ambulatory in its nature and should be enforced *in rem* or *in personam* in any maritime court in the world where jurisdiction could be secured of the defendant either personally or by attachment or arrest of property.

Libelant would have been entitled to maintain an action *in rem*, against the *Martha Washington*, the vessel under attachment in this case, for the coal furnished on May 29, of the value of £734:16:6, on June 28 of the value of £972:8:6, and on July 23 of the value of £735:19:9. Stipulation, Paragraph 5.

The reason that these proceedings were brought *in personam* was that the *Martha Washington* was the only vessel within the jurisdiction to which coal had been furnished, and as there were so many vessels involved an action *in personam*

seemed a more logical and simpler method of procedure than to sue the *Martha Washington in rem* and also attach her in a separate proceeding involving the other vessels.

The obligation of the respondent could have been assigned by the libelant before the war to any person in the world, and since to the subject of any nation not at war with England. If it had been assigned to any person other than a subject of an enemy of Austria, no question could have been raised as to its enforcement here in this or any other proper action.

In the case of *The Anna Catharina*, 4 C. Rob. 107, 112-13, where, at the outbreak of war between England and Spain, a British subject had a contract under which he was to trade with the Spanish Government and transferred the same to a neutral, Sir William Scott recognized the contract as legal in the English courts, notwithstanding its illegality if it had remained in the hands of a British subject.

With respect to the libelant's right to recover, the Circuit Court of Appeals for the 2nd Circuit in its opinion, fol. 429, summed up the situation in these words:

"The respondent does not deny its obligation to pay."

b. *The respondent admitted in its answer that the Court had jurisdiction.*

The libel alleged that the matters set forth were within the jurisdiction of the District Court. Fol. 10.

This was admitted by the respondent. Article fifth of its answer, fol. 23, is as follows:

"Respondent admits that all and singular the premises of this libel are within the admiralty and maritime jurisdiction of this Honorable Court."

The objection raised on the trial to the Court's jurisdiction was that the respondent is an Austrian subject. It is to be observed that this objection does not go to the subject matter of the suit and is at most, an objection of which the respondent alone and not the Court could have availed itself. Being an objection which obviously was personal to the respondent it should have been pleaded.

Under well settled principles the respondent having entered a general appearance and pleaded to the merits, the objection to the Court's jurisdiction was waived. *N. Y. & Oriental S.S. Co. v. U. S.*, 202 Fed. 311; *Farrar & Brown v. U. S.*, 3 Pet. 458; *Ex parte Schollenberger*, 96 U. S. 369, 378; *Southern Express Co. v. Todd*, C. C. A. 8th Circ., 56 Fed. 104; *Howland Pulp & Paper Co. v.*

Alfreds, C. C. A. 1st Circ., 179 Fed. 482; *Betzoldt v. American Insurance Co.*, 47 Fed. 706.

In *Betzoldt v. American Insurance Co.*, 47 Fed. 706, the facts were that the plaintiff, an alien whose citizenship was not stated, sued the defendant, a Missouri corporation, in the Eastern District of Michigan, where the defendant entered a general appearance and plead to the merits. The defendant then sought to dispute the jurisdiction of the Court under the Act of Congress, 1887, which provided that suit should not be brought against any person elsewhere than in the district "in which he is an inhabitant".

The Court held that the provision forbidding suit was a personal privilege of the defendant and had been waived by his general appearance.

In *N. Y. & Oriental SS. Co. v. U. S.*, 202 Fed. 311, C. C. A., 2d Cir., the Court held that a general appearance by a United States District Attorney waived any personal defense that the United States might have with respect to the district in which the suit was brought.

The case at bar, therefore, presents this singular situation:

The subject matter is peculiarly within the jurisdiction of the Admiralty Court, and both parties have admitted the Court's jurisdiction over them, yet the Court of its own motion declined to exercise jurisdiction because of the fact that the respondent

is a subject of the Emperor of Austria who is at war with the King of England, the sovereign of the libellant.

The District Court and the Circuit Court of Appeals have in effect allowed the respondent to come in and go out of Court at its will, because although it admitted the jurisdiction of the Court in its answer and merely put the libellant to proof, both Courts have held that, acting within their discretion, under the circumstances they can refuse to adjudicate on the issues.

To allow a party to come in and go out of court at its will has been a subject of criticism by this Court in the case of the *People of Porto Rico vs. Ramos*, 232 U. S. 627, in which the question of an appearance of Porto Rico by its Attorney General was involved. In that case Mr. Justice McKenna said at page 632:

"Porto Rico, therefore, through its Attorney General, not only gave its consent to be a party to the cause, but invoked and obtained the ruling of the Court against the resistance of the plaintiff to make it party to the cause.

"The complaint having been amended as moved and directed and nearly a year having elapsed, there came a change of view, but the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court as its will, the other party having no right of resistance to either step."

Certainly, in the present case, as the respondent did not take timely exception to the jurisdiction, it cannot properly now be allowed to rid itself of the jurisdiction of the Court, nor can the Courts below properly escape from their duty of adjudicating the issues involved, of which their jurisdiction has been admitted by the respondent.

c. The Court should have adjudicated the case in regular course.

It is well settled that our admiralty courts will take jurisdiction in proceedings between foreigners either *in rem* or *in personam*, notwithstanding that the contract was made and was to be performed in a foreign country. The only requisite is that there should be jurisdiction of person or property. *The Maggie Hammond* (1869), 9 Wall. 435; *The Jerusalem* (1814), 2 Gall. 191; *Thomassen v. Whitwell* (1877), 9 Ben. 113; *Bernhard v. Greene* (1874), 3 Sawyer, 230; *Mason v. Blaireau* (1804), 2 Cranch, 240; *Cooper v. Newman* (1871), 14 Wall. 152; *The Napoleon* (1845), Olc. 208; *Davis v. Leslie* (1848), *Abb. Adm.* 123; *Bucker v. Klorkgeter* (1849), *Abb. Adm.* 402; *Fairgrieve v. Marine Ins. Co.* (1899), 94 Fed. 686; C. C. A. 6th Circ.

Although in some suits between foreigners our courts may have discretion to decline to take

jurisdiction this is not such a case. The discretion referred to is not absolute but has been strictly defined by this Court. *The Maggie Hammond*, 9 Wall. 435, 456, 457. *The Belgenland*, 114 U. S. 355.

In the *Maggie Hammond*, *supra*, the only situation indicated as justifying refusal to exercise jurisdiction is stated at page 457 as follows :

“The Court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.”

The parties to this case have no home forum. The libelant cannot secure jurisdiction in England or maintain the action in Austrian courts. If the Court declines to take jurisdiction, the result will be a denial of all justice.

The principle of the *Maggie Hammond* was evidently in the mind of the District Judge in this case, although he did not follow it. He said at fols. 388, 389:

“Indeed, where the parties are not only foreigners, but belong to different nations, and have therefore no common form, good and sufficient reason should appear to warrant a refusal to entertain the action.”

In the *Belgenland*, *supra*, a collision took place on the high seas between vessels of different nationalities. The Court in holding that the ad-

miralty courts of the United States should not decline to take jurisdiction stated quite clearly the circumstances which should justify an admiralty court in declining to take jurisdiction. The circumstances mentioned are: (1) That both vessels are subject to the laws of the same country and there is no difficulty in a resort to its courts. (2) That the disputes are between seamen and master, and that in the absence of treaty the consul of the country does not assent to the jurisdiction; where the suit is for wrongful dismissal or acts of cruelty the consul's assent is unnecessary. (3) When the suit involves matters affecting only parties on the vessel which must be determined by the law of the country to which the vessel belongs.

At pages 368, 369, Mr. Justice Bradley said:

“ Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured or doing the service should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is pre-eminently one *communis juris*, and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of the nations to which the litigants belong. As

Judge Deady very justly said in a case before him in the district of Oregon: 'The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found.' *Bernhard v. Greene*, 3 Sawyer, 230, 235."

In the case at bar the libelant and respondent are not subject to the laws of the same country. It is impossible for the English libelant to resort to the Austrian courts. It is equally impossible for an Austrian litigant to resort to the English courts. The suit is clearly *communis juris* and is plainly outside of the exceptions enumerated by the Supreme Court in the case of the *Belgenland*, *supra*, and within the rule laid down in the quotation last made. Once the Supreme Court has specified the circumstances under which jurisdiction may be denied, as it has done in the *Maggie Hammond* and the *Belgenland*, the question of discretion to decline jurisdiction under the circumstances specified can hardly be considered open.

In addition to the fact that the present controversy is *communis juris*, and that the parties do not belong to the same foreign nation, it is worth noting that part of the coal for which the libelant is suing enabled the *Martha Washington*, the vessel which was attached as security for the

whole cargo, to complete her voyage to this country. Thus the United States had an interest in the transaction as directly supporting its commerce. This point was made in the *Belgenland, supra*. At page 366 of that case reference is made to the case of *The Jerusalem*, 2 Gall. 191, decided by Justice Story, where jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte. Although it did not appear that it was intended that the vessel should come to the United States, it is clearly to be inferred that if it did appear that the vessel was intended to come to the United States, there could have been no question of the jurisdiction.

The situation before the Court in the present litigation is, therefore, merely that of a contract executed in full on the part of a British subject by furnishing coal to an Austrian subject before the outbreak of the present war at Algiers, a French dependency.

Judge Veeder's opinion amounts to the enforcement by our courts of the Austrian war law contained in the proclamations of the Emperor and his joint ministry. *Stipulation*, Exhibits 21-24; fols. 320 to 347. It is in effect giving extraterritorial force to the Austrian law in our courts to make it a bar to the claim of a British subject who has secured jurisdiction by attachment of an Austrian subject's property.

Judge Veeder in his opinion, fol. 403, summed up his reasons for declining to entertain jurisdiction as follows: "From the stand-point of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries forbids a payment by one belligerent subject to his enemy during the continuance of war. This Court in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it."

How does this affect the action of this Court in this case? The obligation here sued on has nothing to do with war, and its enforcement will not aid England as against Austria.

The libelant is seeking no favor as a belligerent from this Court, but only enforcement of its private right which the respondent does not dispute. This right the libelant contends should be equally enforced in favor of an Austrian subject suing an English subject or an Englishman suing an Austrian subject in all cases where in times of peace the right would be enforced. This is strict impartiality.

As to neutrality, the objection is the other way. If enforcement of the obligation is denied on the ground that Austria by her war measures has prohibited the respondent from discharging its debt, that cannot be said to be neutral. That would be directly to aid Austria in carrying out her purpose

of destroying the property of and denying justice to all Englishmen.

The only safe course for a neutral court is to do full justice as between the subjects of all the belligerent nations—to the English libelant as against the Austrian respondent and to the Austrian libelant as against the English respondent.

Strict neutrality requires that we disregard the war measures of all belligerents and apply our own laws, since neither party has any claim to have his own law applied.

It is not unneutral for our citizens to export munitions of war directly to belligerents. *Northern Pacific Ry. Co. v. American Trading Co.*, 195 U. S. 439. As this court may notice, this question has been much agitated in the present war, the contention being that this country, though friendly to Germany, was aiding its enemies by not prohibiting the export of munitions of war. The position of our Government has made it clear that it is the right of our citizens to sell munitions of war to whomsoever will buy, and that to prohibit this commerce on the ground suggested would be a distinctly unneutral act. If this commerce in the very articles of war with the enemies of Germany is not unneutral, how can it be said that the enforcement of simple contract obligations, having nothing to do with war, infringes our neutrality?

Judge Veeder in his opinion, fol. 384, said:

“ So far as neutrality is concerned, how can it be a breach of neutrality for this court to decide controversies in accordance with the settled principles of maritime law, when regularly presented to it in accordance with recognized admiralty procedure? How can such enforcement here of legal rights between all belligerent subjects, irrespective of their enemy status abroad, be said to infringe that attitude of impartiality which lies at the foundation of neutrality?”

The District Judge, therefore, clearly did not base his decision on any question of neutrality, and differed in regard to the neutrality question with the contentions made on behalf of the respondent.

d. *The failure of the courts to adjudicate this case is not comity, but a breach of comity.*

It can hardly be comity to enforce an Austrian war measure prescribing that payment shall not be made and decline to observe the law of France which created the substantial right. The Austrian proclamation prohibiting payments to England does not deny the existence of the right, but merely purports to postpone its enforcement. The question is merely one of maintaining suits in our courts, with respect to which neither the laws of Great Britain nor Austria nor France can confer or deny any right. The libellant does not

seek to enforce the law of Great Britain, but a private right *communis juris*. England has not made any law or proclamation that the libellant shall recover in this country.

In enforcing this right or refusing to enforce it, this Court is not giving efficacy to the laws of one of the belligerents as against those of the other, but is merely passing on the sufficiency, as a defense in our courts, of the Austrian war measure.

The only objection to the enforcement of the obligation is that it is held by a British subject. If Austrians, Turks, Swedes, Norwegians, Danes, Greeks or Spaniards held similar claims against the respondent they could proceed here without objection. The defense is in reality a plea of alien enemy, which so long ago as 1799 was said by Lord Kenyon in *Casseres v. Bell*, 8 Term Reports, 166, to be "an odious plea".

Raised in the courts of a neutral nation, such a plea should have been as unsuccessful as it is odious.

Notwithstanding that we know no alien enemies, this Court is called upon by this defense to discriminate in favor of the Austrian Government against Englishmen. Since the obligation itself is not affected by the prohibition it seems clear enough that the prohibition,—considered for the moment from the point of view most favorable to the claimant—goes only to the party who shall sue. But it is elementary that the matter of

parties is to be governed by the law of the forum, and, as we have previously pointed out, a question of personal jurisdiction may be waived, and in this case was waived.

Although the Austrian proclamation has some of the features of a moratorium, it is for the purposes of this defense only a penal law.

A civil moratorium will be recognized in a foreign court as the law in force at the place of payment provided it is not inconsistent with the public policy of the forum, and is otherwise enforceable. *Roquette v. Overman*, L. R. 10, Q. B. 525. But there was no moratorium prohibiting payment in England where payment in this case should have been made.

No rule of law which has hitherto been recognized can be invoked to call for the enforcement *in this country* of the Austrian prohibition as a moratorium. It must stand or fall in its character as a prohibition. In this guise it was not intended to relieve Austrian subjects from the immediate pressure of debts, as is the case of ordinary moratorium decrees, nor is it intended to benefit them at all. It is for the sole purpose of destroying British commerce and property in connection with war, and is highly penal. This country has no interest in destroying British property or commerce and indeed must be circumspect not to aid others in that purpose.

It is immaterial that Great Britain has enacted

similar prohibitions although not nearly so stringent. Austria does not acknowledge the force of these prohibitions any more than Great Britain acknowledges the force of German or Austrian proclamations. *Robinson v. Continental Ins. Co. of Mannheim* [1915], 1 K. B. 155. It therefore cannot be said that the parties acknowledge the same law as the District Judge seems to intimate.

For this neutral country to deny enforcement of an admitted obligation on the ground that some other country has prohibited enforcement of such an obligation within the reach of its law is simply to declare to the libelant that he shall not have relief because his enemy has decreed otherwise.

It is settled beyond all controversy that the matter of parties is governed by the law of the forum, and that the courts of one country will not enforce or recognize the penal laws of another. It is generally said to be contrary to public policy to enforce foreign penal laws. *Huntington v. Attrill*, 146 U. S. 657; Minor, on Conflict of Laws, Sect. 10 and notes.

On the strength of these fundamental principles it would seem that the defense of the Austrian proclamation must be held insufficient as a defense in this case.

But Judge Veeder in effect said that comity requires that this Court give effect to the defense.

In *Hilton v. Guyot*, 159 U. S. 113, 163, comity is defined to be "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation * * *."

Each sovereign state is supreme within its own limits, and it is always within its power at any time to exclude any or all foreign laws from operation within its borders.

Law is *prima facie* territorial. The effect of the Austrian proclamation is limited to the boundaries of the Austrian Empire unless other nations choose for the time being to abdicate their municipal law and set up the law of the Austrian proclamation in its stead.

Comity in its true sense, however, is limited to enforcing substantive rights. Thus, in Wharton's *Conflict of Laws*, Sect. 428 A, Vol. 2, pages 938-9 (3d Ed. 1905), it is said:

"Not only will the courts entertain an action on a foreign contract, but they will generally, as a matter of comity, determine and enforce the substantive rights and obligations under the contract in accordance with the proper law of the contract, ascertained by the application of what are deemed at the forum to be the true principles of international law upon the subject * * *."

Rorer on *Interstate Law* says, at page 7:

"In a case cited in the note [*Railway v. McCormick*, 71 Tex. 660, 667], the ruling is unam-

biguous and express that comity extends only to enforce obligations, contracts and rights under provisions of law of other countries which are analogous or similar to those of the state where the litigation arises."

Comity is thus seen to be a matter of displacing our own municipal law for the *enforcement* of a substantive right accruing under some foreign law which is analogous to a law existing in the state where the litigation arises.

The Austrian proclamation clearly does not fall within this rule.

In the first place, it does not purport to give any right, substantive or otherwise. It is merely a prohibition, which came into being after the original obligation in favor of the libellant was complete, due to the fact that the coal had been furnished to the respondent's vessels before the war began.

In the second-place, there is nothing analogous to the proclamation in our own law.

And finally, if there were, we conceive that its penal character would prevent the enforcement by analogy of any right arising under it.

The respondent, in effect, asks that we displace our municipal law, which allows the enforcement of all ordinary substantive obligations, even though arising abroad, and set up in its place this Austrian prohibition which declares that an obligation, created by a law which the respondent

recognized when the obligation arose, shall not be enforced for the time being.

The very statement of the proposition, once its elements are appreciated, is enough to condemn it. Yet effect cannot be given to the defense asserted by the respondent unless this Austrian war measure is made a part of the municipal law of this country. That would not be in any sense an exercise of comity. That would be to deny comity to the only substantive obligation in the suit, namely, the libellant's admitted claim, and to take sides with the belligerent which says that that obligation shall not be paid for the time being.

The reasons stated by the District Judge for his decision have been strongly disapproved, and a solid ground for the application of the opposite rule has been enunciated by Vice Chancellor Stevens of the Chancery Court of New Jersey in the case of *Compagnie Universelle de Telegraphie et de Telephonie Sans Fil v. United States Service Corporation, et al*, 95 Atlantic Reporter 187, decided since Judge Veeder announced his opinion in this case.

The New Jersey case was brought to enforce a contract to convey land at Tuckerton, New Jersey, on which a radio-telegraph station had been erected. The contract was entered into at Paris between French and German subjects. The German subjects, defendants in the action, pleaded to

the jurisdiction of the Court, basing their plea on the ground that the Court ought not now to entertain the suit because it would be unlawful according to the laws of their respective countries for the subjects or citizens of Germany or France to perform a decree if made. After quoting with approval Judge Veeder's summary in the case at bar of the law applicable as between nations at war, Vice Chancellor Stevens says, 95 Atl. Rep. 189:

"From the opinion of Judge Veeder it is apparent that in the case of executed contracts,—that is, contracts like the one under consideration, performed on one side,—suspension of the remedy even in a belligerent court, is not absolute. Such contracts will be enforced where it is to the advantage of the belligerent to enforce them. But this is by no means all. It was held *In re Boussmaker*, 13 Vesey, 71, that in cases of bankruptcy, an alien enemy's claim against the bankrupt can be proved, but that the dividend will be reserved until the close of the war. In *McVeigh v. United States*, 11 Wall. 267, it was held that an alien enemy can defend a suit brought against him. As far back as the time of William III it was decided that if an alien enemy came into the kingdom, *sub salvo conductu*, he might maintain an action; for, said the Court, 'suing is but a consequential right of protection and therefore an alien enemy that is here in peace, under protection, may sue a bond.' Trotter in his work on 'Contract During War,'

page 951, says: 'The general rule is that an action cannot, during war, be brought by or on behalf of an alien enemy unless by virtue of a statute, or by an order in council, or a proclamation, or a license from the crown, or unless he comes into the British dominions under a flag of truce, a cartel, a pass or some other public authority that puts him in the King's peace *pro hac vice*. In *Casseres v. Bell*, 8 T. R. 166, Lord Kenyon said that the plea of alien enemy was an odious one, and in *Kershaw v. Kelsey*, 100 Mass. 561, where it was held that payment to the agent of an alien enemy was good, Gray, J., said: 'At this age of the world when all the tendencies of the law of Nations are to exempt individuals and private contracts from injury or restraints in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.'

"These citations demonstrate that even in the view of the belligerents themselves, contracts entered into before the beginning of hostilities continue in force during the war; that they may be sued upon, if to the disadvantage of the alien enemy defendant; that the alien enemy may always defend and that he may, in exceptional cases, sue. Is it possible that the courts of a neutral would refuse jurisdiction where enemy courts would entertain it? It is said in the opinion of Judge Veeder (*supra*) that there is no authority bearing upon the question of the standing of belligerents in the court of a neutral

where those belligerents are forbidden by the laws of their respective countries to have dealings with each other. This may have arisen from the fact that no suit by the subject of one belligerent nation domiciled abroad, has ever been brought against the subject of another in the court of a neutral—a supposition somewhat improbable—or from the fact that the question has not been raised, because it has been the professional opinion that inasmuch as the laws of foreign countries, have no extraterritorial force, the courts of neutrals are as completely open to suitors whose governments are at war with each other as to other litigants. If the only ground upon which the courts of a belligerent are shut against its alien enemy, is possible advantage that might accrue to him, this ground fails entirely when the courts of a neutral are appealed to. The neutral nation is the friend of both belligerents and comity requires that the doors of its courts be open, if their subjects have wrongs to be righted. On what ground then are they, in the case at hand, to be closed? Certainly not on the plea of alien enemy."

Then, after discussing the French and German war law and finding that each seemed severally to codify the law as stated in Judge Veeder's opinion, Vice Chancellor Stevens proceeds as follows, 95 Atl. Rep. 191:

"Judge Veeder dismissed the suit brought by Watts & Co. He seems to have treated it as one in which exercise of jurisdiction was dis-

cretionary, the parties, the contract and the attached vessel being all foreign. He seems to have thought that the pendency of the war and the laws and ordinances promulgated by the belligerents were good reasons for declining jurisdiction. Whether they were or not—and they do not seem to be very obviously so—the case is no authority for the proposition that this Court should refuse to entertain a question of title to land in New Jersey. * * *

“To sum up. In times of peace, the Courts take jurisdiction, as a matter of course, for the benefit of denizens and aliens alike. If foreign nations are at war among themselves, this nation does not cease to be friendly. Its courts remain open to their subjects. Certainly a French citizen may still sue an American citizen. Why should he not sue a German subject? No law of France prohibits it. On the contrary, he may sue even in France, if to his advantage and not to the advantage of his enemy. Why may he not sue in this Court? If he may not, it can only be on the ground that this Court will give *some* effect to German legislation enacted as a war measure—as a means of crippling its enemy. As I have already shown, there is nothing in this legislation, disclosed at least by the plea, that prohibits the German subject from defending against a French claim. But suppose there were. If this Court gave effect to it, it would, in a measure, be enforcing German law, which on well settled principles can have no extra-territorial operation, to the detriment of the French citizen asking to be heard. This it

seems to me would be an unneutral act. I therefore think that the plea should be overruled and that the defendants who have not disclaimed, should answer."

With all due respect, Vice Chancellor Stevens stated a distinction between his case and Judge Veeder's which does not exist. For Vice Chancellor Stevens' case was purely a case for specific performance which could have been maintained wherever the defendant could have been reached with process. It was not in any sense a real action, as for example an action for ejectment would have been. So the distinction is insubstantial and Vice Chancellor Stevens' opinion must be deemed directly at issue with Judge Veeder's.

Vice Chancellor Stevens has correctly stated the law applicable to the present case and it is very clear that if it had been before him the libellant would have had a decree.

In a clear case of admitted liability, it is submitted, the enforcement of the Austrian law at the expense of the British libellants was an unneutral act by a neutral Court.

It is submitted, therefore, that the libellant should have had a decree for the full amount of its claim with interest in respect of coal furnished to each vessel from the date on which it was furnished at the usual rate of six per cent.

SECOND POINT.

THE APPEAL FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS VACATED THE DECREE OF THE DISTRICT COURT AND THE LIBELANT WAS ENTITLED TO A TRIAL DE NOVO IN THE CIRCUIT COURT OF APPEALS. THE LATTER SHOULD NOT HAVE DEALT WITH THE CASE AS A MATTER OF THE DISCRETION OF THE DISTRICT COURT, BUT SHOULD HAVE ADJUDICATED THE QUESTIONS PRESENTED WITHOUT REGARD TO ANY FINDING OF THE DISTRICT COURT.

Upon appeal from the District Court's decision dismissing the libel, the Circuit Court of Appeals for the 2nd Circuit said, folio 430:

"Judge Veeder in the District Court, feeling that it was inexpedient under these circumstances to take jurisdiction of the controversy, dismissed the libel without prejudice. Whether to take or decline jurisdiction was a matter within his discretion, see the *Belgenland*, 114 U. S. 355; *Benedict on Admiralty*, § 195, and as no abuse of discretion appears, the decree is affirmed."

In relying on the discretion of the District Court, instead of examining the questions presented, we think that the Circuit Court of Appeals erred.

It was settled long ago by this Court that an appeal in admiralty from a District Court to a Cir-

cuit Court vacated altogether the decree of the District Court and the case was tried *de novo* in the Circuit Court.

In *Irvine v. Hesper*, 122 U. S. 256, the District Court awarded \$8,000 salvage to the libelants who appealed to the Circuit Court. Although the claimant did not appeal, that Court reduced the award to \$4,200. The libelants then appealed to the Supreme Court which affirmed the decree of the Circuit Court. At page 266, Mr. Justice Blatchford said.

"The claimants not having appealed to the Circuit Court, it is suggested that they are liable for at least the amount awarded by the District Court, and that the Circuit Court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. *Yeaton v. United States*, 8 Cranch, 281, 3 L. Ed. 101; *Anonymous*, 1 Gall. 22, Fed. Cas. No. 444; *The Roarer*, 1 Blatchf., 1 Fed. Cas. No. 11,876; *The Saratoga v. 438 Bales of Cotton*, 1 Woods, 75, Fed. Cas. No. 12,356; *The Lucille*, 19 Wall. 73, 22 L. Ed. 64; *The Charles Morgan*, 115 U. S. 69, 75, 5 Supt. Ct. 1172, 29 L. Ed. 316. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed they did so in view of the rule, and took the risk of a trial of the case *de novo*. The whole case was opened by

their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

Many of the Circuit Courts of Appeal, among others that for the Second Circuit, have declared similar principles in respect of Admiralty appeals.

In *Munson S. S. Line v. Miramar S. S. Co., Ltd.*, 1909, C. C. A., 2d Circ., 167 Fed. 960, the Court held that the fact that one party in an admiralty proceeding does not appeal from a decree of the District Court does not preclude the Circuit Court from directing a decree more favorable to him. At page 964 the Court said:

"We are of opinion that this court stands with relation to the District Court exactly as the Supreme Court before the act of 1875 stood in relation to the Circuit Court. The appeal is still a new trial in this court subject to the regulations before mentioned, and we have power to modify the decree of the District Court as the Supreme Court had between 1803 and 1876. *The Western States*, 159 Fed. 354, 360, 86 C. C. A. 354. This case illustrates how completely an appeal to this court is a trial *de novo*. It arose under section 566, Rev. St. U. S. (U. S. Comp. St. 1901, p. 461), giving either party in admiralty causes arising on the Great Lakes the right to a trial of issues of fact by a jury. The verdict of the jury was for the libellant in the sum of \$15,000. The District Judge entered a decree for \$5,000. We held the verdict binding and not

advisory, so that the District Judge should either have entered a decree for \$15,000 or have ordered a new trial. Still we affirm the decree, because we thought the amount awarded the libellant sufficient." See the authorities cited in this case.

In *Gilchrist v. Chicago Insurance Co.* 104 Fed. 566, Mr. Justice Harlan, sitting in the Circuit Court of Appeals for the Seventh Circuit, very carefully considered the question as to what effect, if any the act creating the Circuit Court of Appeals, had had upon the rule that an appeal in admiralty is a trial *de novo*, and held that the act had not changed the former practice. At page 570 the learned Justice said:

"The appellants contend that the present appeal was from so much of the decree as denied the full amount of their claim, and that the case can be heard in this Court *de novo* only as to that part of the decree. The contention of the appellees, on the other hand, is that the appeal vacates altogether the decree of the District Court, and that the cause may be heard *de novo* in respect of every matter covered by the pleadings.

"Prior to the passage of the act of March 3, 1891 (26 Stat. 826, c. 517), creating the Circuit Court of Appeals, it was well established that on an appeal in admiralty from a District Court to a Circuit Court the cause was to be tried anew, as if no decree had been rendered."

[After quoting from Chief Justice Marshall's opinion in *The General Pinkney*, quoted in Judge

Ward's opinion, and from *The Lucille*, 19 Wall. 73, and *Irvine v. The Hesper*, 223 U. S. 256, 266, and citing other authorities, to the effect that an appeal in admiralty is a trial *de novo*, Mr. Justice Harlan continued as follows (p. 571):

"We do not think that the rule has been changed by the above act of March 3, 1891, under which an appeal from a District Court goes to the Circuit Court of Appeals, and not to the Circuit Court. The clause of that act (section 11), that 'all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Court of Appeals', does not prevent a Circuit Court of Appeals, when hearing an appeal in admiralty, from exercising all the power that a Circuit Court could have exercised in a like case prior to the act of 1891. On the contrary, that clause implies that an admiralty appeal by the libellant in the Circuit Court of Appeals, under the act of 1891, is to be heard and determined under substantially the same rules and limitations that regulated the determination of admiralty appeals in the Circuit Courts prior to the passage of that act. It results that this Court may properly consider and determine every issue raised by the pleadings, and without regard to the decree below, direct such a decree to be entered here as is consistent with law. If, in our judgment, the libellants are not entitled to a decree in any amount—and such is the contention of the underwriters—we may dismiss the

libel, notwithstanding the underwriters did not themselves directly appeal from the decree."

In *Chicago Insurance Company v. Graham & Morton Transportation Company*, 108 Fed. 271, 273, the Circuit Court of Appeals for the Seventh Circuit again considered the effect of the act creating the Circuit Court of Appeals upon admiralty cases, and the law was there stated as follows:

"The motion to dismiss presents the question whether in an admiralty cause an assignment of errors is essential for the purpose of an appeal. It may not be denied that, prior to the organization of the Circuit Courts of Appeals, upon appeal in an admiralty cause from the District to the Circuit Court no assignment of errors was necessary. The cause was there to be tried anew, as if no decree had been rendered; the appeal superseding and vacating the decree from which it was taken. The cause in the Circuit Court could be heard on new pleadings and further evidence. *Yeaton v. U. S.*, 5 Cranch. 281, 3 L. Ed. 101; *The Lucille*, 19 Wall. 73, 22 L. Ed. 64. *The Hesper*, 122 U. S. 256; 7 Sup. Ct. 1177, 30 L. Ed. 1175. A decree was entered in the Circuit Court, and enforced by that court without remand of the cause to the district court. *The Louisville*, 154 U. S. 659, 14 Sup. Ct. 1190, 25 L. Ed. 771. Indeed, rule 52 in admiralty expressly provided that 'no reason of appeal shall be filed or inserted in the transcript'. Under the act creating the Circuit Courts of Appeals, it has seemed to the writer that appeals in admiralty now

come to this court, as formerly they went to, the Circuit Court, to be heard here as formerly heard there, and, it may be, upon new pleadings and upon new evidence. Such he understands to be the ruling of this court in *Gilchrist v. Insurance Co.* (C. C. A.), 104 Fed. 566. He is, however, of opinion that, under section 10 of the act creating these appellate courts (31 C. C. A. xxxiii, 90 Fed. xxxiii), it was not contemplated that an original decree should be entered here, but that the cause should be remanded to the District Court for sentence and execution. The question, however, in one of practice only, and it is more desirable that the practice should be settled and uniform than that it should conform to any previous practice; and as my brethren are of opinion that an assignment of errors is desirable, and to conform the practice to that circuit which has most to do with the admiralty, we hold that rule 11 (31 C. C. A. cxlvi, 90 Fed. cxlvi) applies to admiralty as to all other cases, and that an assignment of errors is essential, and should be returned with the record, and that paragraph 6 of rule 14 (31 C. C. A. clviii, 90 Fed. clviii) so far as by reference to rule 52 in admiralty it seems to be in conflict, must be disregarded. This, however, does not prevent the court from permitting new pleadings on new evidence in proper cases. We are also of opinion that no new decree should be entered here, but that, as in other appeals, the cause should be remanded to the court below."

In *Nelson v. While*, 83 Fed. 215, the question of the effect of the act creating the Circuit Court

of Appeals was considered from another standpoint. In that case the Circuit Court of Appeals for the Ninth Circuit stated the law as follows:

"It is a well-settled rule that an appeal in admiralty is, to all intents and purposes, a trial *de novo*. *Yeaton v. U. S.* 5 Cranch, 281; *The Lucille v. Respass*, 19 Wall. 73; *The Charles Morgan*, 115 U. S. 69, 75, 5 Sup. Ct. 1172; *Irvine v. The Hesper*, 122 U. S. 256, 267, 7 Sup. Ct. 1177; *Naon.*, 1 Gall. 22, Fed. Cas. No. 444; *The Roarer*, 1 Blatchf. 1, Fed. Cas. No. 11,876; *The Saratoga v. 438 Bales of Cotton*, 1 Woods, 75 Fed. Cas. No. 12,356; *The Havilah*, 1 C. C. A. 77, 48 Fed. 684; *Singlehurst v. LaCompagnie Generale Transatlantique*, 1 C. C. A. 487, 50 Fed. 104; *The Philadelphia*, 9 C. C. A. 54, 60 Fed. 423. As was said by Mr. Chief Justice Marshall in *Yeaton v. U. S.* *supra*:

"The majority of the court is equally of the opinion that in admiralty cases an appeal suspends the sentence altogether, and that it is not *res adjudicata* until the final sentence of the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice, not only in cases of appeal from the district to the circuit courts of the United, but in this court, also.'

"If the cause is to be heard in the appellate court *de novo*, and the merits of the case are involved in the questions presented to the court for its consideration, it is essential and necessary that the Court should have the testimony upon which the lower Court bases its decision. It is claimed

that the act of February 16, 1875, entitled 'An act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes', has altered the practice, as defined in the above-entitled case, so far as admiralty appeals to the Circuit Court of Appeals are concerned. The act (18 Stat. 315) provided:

" 'That the Circuit Courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the Court, shall find the facts and conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. * * * The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions of law.'

" In this case the transcript of record contains certain findings of facts found by the District Judge, and it is contended that, for the purposes of the question of law which the appellants seek to have this Court determine these findings of fact are sufficient and binding. It is to be observed that the District Judge, in admiralty cases, is not required by law, nor does it appear to be the practice to make findings of fact. The general practice seems to be for the judge to render an opinion, written or oral, whenever the exigencies of the case require it, in which such facts are stated as the Court deems the evidence supports

and justifies the decree. But, however, this may be, we are of the opinion that the act referred to is inapplicable to appeals in admiralty from the existing District Courts to the present Circuit Courts of Appeal. The same question was raised in *The Havilah*, 1 C. C. A. 77, 48 Fed. 684, where the Circuit Court of Appeals for the Second Circuit used the following language:

“ ‘ Obviously, that act does not apply to an appeal to the Circuit Court of Appeals. The eleventh section of the act of March 3, 1891, establishing the circuit court of appeals, provides that “ all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writ of error provided for in this act in respect of the Circuit Court of Appeals”. By the act appeals in admiralty henceforth lie direct from the District Court to the Court of Appeals, and no method or system of review by findings or bill of exceptions was in force for the review by appeals in admiralty from the District Court when the act was passed. It would be unreasonable to hold that Congress intended a different practice to apply to the limited number of cases where appeal lies from the Circuit Court to the Circuit Court of Appeals (solely because they were pending and undecided when the act was passed) from that which would apply to appeals in admiralty from the District Court. As the act of 1875 provided a method and system of review, through appeals, only for such cases in the Circuit Court as went to the Supreme Court, there seems no good reason for extending the

general language of the eleventh section of the new act to cover cases in the Circuit Court which are not to go to that tribunal'."

In *Clark v. 505,000 feet of Lumber*, 65 Fed. 236, the Circuit Court of Appeals for the Seventh Circuit again stated the law as follows:

"In an appeal in admiralty from the District Court, this court is not reviewing 'a question of discretion, but is hearing an appeal which is a new trial', and must deal with the questions involved 'as though they were original questions'."

In *Pettie v. Boston Towboat Co.*, 49 Fed. 464, 468, the Circuit Court of Appeals for the Second Circuit, speaking by Judge Wallace, in passing upon a question of costs, said:

"*We are not reviewing as an appellate court a question of discretion, but are hearing an appeal which is a new trial*, and must, therefore, deal with questions of costs as though they were original questions."

In *The San Rafael*, 141 Fed. 270, action was brought for personal injuries, and the District Court awarded \$5,000 damages. The claimant appealed, on the ground that the award was excessive, and no cross appeal was taken. The Circuit Court of Appeals for the Ninth Circuit held, however, that the award was insufficient, and ordered a decree entered for \$7,500. After

quoting from *Irvine v. The Hesper*, the Court added:

"The same rule applies here, since this court now has the jurisdiction of appeals in admiralty from the district court that formerly appertained to the circuit court."

The appeal to the Circuit Court in the case at bar did not, therefore, bring up for review merely the propriety of the District Court's discretion, but operated as a new trial which required that the Circuit Court hear and determine the matters in controversy without regard to the District Court's finding.

Since the libelant was entitled to a new trial in the Circuit Court it was plainly prejudiced by the fact that it did not get it. When it is the duty of a Court to hear a case and render its judgment therein, its failure to do so is error. *Cramp & Son Ship & Engine Building Co. v. International Curtis Marine Turbine Company*, 1913, 228 U. S. 645; *Lutcher & Wall Lumber Co. v. Knight*, 1910, 217 U. S. 257.

In *Cramp & Sons Ship & Engine Building Company v. International Curtis Marine Turbine Company*, 1913, 228 U. S. 645, an action was brought for infringement of patent. The District Court before whom the case was argued entered a decree *pro forma* stating in a memorandum that the current business of the Court did not allow him

time to consider the case, and that as it was of such unusual importance he felt justified in making a formal disposition of the matter, so that it could be heard promptly by an Appellate Court. This Court held that it was the duty of the trial court to have examined the merits of the case. At page 648 this Court said:

"As to the first ground, however much we may appreciate the sense of public duty which led the trial court virtually to decline to examine the merits of the case and enter a *pro forma* decree so that no time might be lost in taking the case to the Circuit Court of Appeals, we do not wish to be understood as giving our sanction to such procedure."

THIRD POINT.

THE DISTRICT COURT RIGHTLY HELD THAT OWING TO THE DISHONOR OF THE DRAFTS THE RELATION OF THE PARTIES WAS THROWN BACK TO THE ORIGINAL DEBT ARISING OUT OF THE LIBELANTS' PERFORMANCE OF ITS CONTRACT, BUT IT ERRED IN NOT ENFORCING THE LIBELANTS' ADMITTED CLAIM.

The contract expressly provided that the drafts had to be paid in order to operate as a discharge of the original obligation to pay for the coal furnished.

It is admitted that the drafts have not been paid and consequently the original claim for the coal sold and delivered remains in its full force.

The taking of a note or acceptance of a draft for supplies is not a novation or a waiver of the right against the owner, or the vessel, unless it is expressly understood and agreed that it shall be considered payment.

The Emily Souder, 1873, 17 Wall. 666-670. In that case, Mr. Justice Field said, in dealing with drafts given by the captain of a vessel, for suppliers of necessities at Maranham, Brazil:

"The drafts given by the captain upon the owners of the vessel in New York were not received by the libelants in discharge and satisfaction of the sums advanced. They were received only as conditional payment; such would be the presumption of law in the absence of any direct evidence on the point. For by the general commercial law of the world, a promise to pay, whether in the form of notes or bills, is not of itself the equivalent of payment; it is treated everywhere in the absence of express agreement or local usage to the contrary, as conditional payment only. On principle, nothing can be payment in fact except what is in truth such, unless specially agreed to be taken as its equivalent. But here the evidence of the libelant is direct and positive that the drafts were only taken as conditional payment and on trial they were produced and surrendered for cancellation. *The Kimball*, 3 Wall. 37; *The Bark Chusan*, 2 Story, 456."

The situation before the court is thus left as it was at the outset. It is merely that of a contract executed in full on the part of a British subject by furnishing coal to an Austrian subject at Algiers. The obligation which arose out of furnishing the coal was for the law of Algiers, which is a French possession, to say. It is undisputed that the law of France created a binding obligation and does not prohibit payment by the respondent to the libellant. If jurisdiction was obtainable in Algiers over the respondent, the claim would be enforced, for the courts of all countries in alliance are open to nationals of other allied countries. The right created at Algiers was substantive, and the failure to recognize and enforce it was a breach of comity.

FOURTH POINT.

IF, AS THE RESPONDENT CLAIMS, THE GIVING OF THE DRAFTS MADE THE PLACE OF PAYMENT UNDER THE CONTRACT LONDON INSTEAD OF ALGIERS, PAYMENT WOULD HAVE BEEN LEGAL AND ENFORCEABLE THERE, AND CONSEQUENTLY THERE IS NO GROUND, ON THE RESPONDENT'S OWN THEORY, FOR REFUSING A RECOVERY IN THE PRESENT CASE.

The point taken by counsel for the respondent in the lower courts that the drafts constituted

payment, and that there has been a novation by acceptance of the drafts is refuted by the terms of the contract itself, which provides not only for acceptance but *payment* of drafts as a means of payment under the contract. The drafts were not substituted obligations, but were merely a means of paying in London instead of paying in cash in Algiers when the coal was furnished.

The respondent argues that the effect of the drafts was to transfer the place of payment from Algiers to London. Even if this be so, which the libelant denies, it does not avail as a defense for the following reasons:

1. Under the law of England, as set forth in the King's Proclamation, known as "Trading with the Enemy Proclamation No. 2", issued on September 9, 1914, and annexed to the stipulation of Facts as Exhibit 19, fols. 277-294, it was provided in Section 7 as follows:

"Nothing in this proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in our dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted." Fol. 292.

Thus express permission was given to a person or a corporation in the position of the libelant to receive payment from an enemy, without being guilty of a prohibited transaction with him. This

is clearly pointed out by Lord Strathclyde in the case of *Orenstein & Koppel v. Egyptian Phosphate Co., Ltd.*, 1914, 2 Scotch L. T. 293, decided in the Court of Sessions of Scotland, 1st Division, November 6, 1914, and reported in *Trotter's Law of Contract During War*, 428. This was one of the cases offered at the trial under the stipulation.

The same right is recognized by Mr. Justice Bailhache in *Ingle v. Continental Ins. Co.*, October 19th and 29th, 1914, 31 T. L. R. 41; (1915), 1 K. B. 227, a case which was also offered in evidence at the time of the trial. Fol. 35.

Mr. Justice Bailhache says:

"I agree with the plaintiffs that the proclamation is not retrospective. Even if this proclamation is to be treated as affecting the position, I am not prepared to hold that payment of a loss by a German Insurance Company, or an action against such insurance company to recover a loss, is a transaction within the meaning of the proclamation. So to hold would be to deprive a British subject of the right to receive money or to sue an alien enemy, which in my opinion he at law has, at any rate, when the right to be paid or to sue has accrued before the defendant has acquired the status of an alien enemy, and I should require to find clear words in a proclamation to induce me to decide that an executive has given the alien enemy relief to which he is not otherwise entitled.

"Paragraph 7 of the Proclamation of Septem-

ber 9, which has not been repealed, seems to me in accordance with this view. I think that this clause is conclusive that the right to receive payment from an alien enemy is intended to be left as it stands at common law. It is perhaps not immaterial to observe that the word 'transactions' is used in this clause as in clause 5 of the Proclamation of October 8. In this clause the word clearly refers to the business dealings in respect of which the right to payment arises and does not include, but is used in contradistinction to the payments themselves."

Under these decisions, it is clear that so far as England was concerned, it was lawful for Watts, Watts & Company, Limited, to receive, and for their alien enemy debtor, the Unione Austriaca di Navigazione, to pay to them in England, the amount involved in this case.

Whether by so paying the Unione Austriaca di Navigazione would have been guilty of a breach of Austrian law is not material to the present controversy, because Austria was not the place of payment and its law did not govern the legality of the payment.

2. Further, it is clear under British law that if jurisdiction could have been obtained by Watts, Watts & Company, Limited, over the Unione Austriaca di Navigazione, they could have maintained an action for the amount due for the coal in the English courts. *Robinson v. Continental*

Ins. Co. of Mannheim, October 16, 1914, 31 T. L. R. 20; *Ingle v. Continental Ins. Co. of Mannheim*, October 19th and 29th, 1914, 31 T. L. R. 41; *Leader, et al. v. Direction Der Disconto-Gesellschaft*, November 26, 1914, 31 T. L. R. 83. Cases offered under Stipulation, fols. 353-359.

Our law is the same as the English law in this regard. Our Supreme Court has said that "whatever may be the extent of the disability of an alien enemy to sue in the courts of a hostile country, it is clear that he is liable to be sued, and this carries with it, the right to use all the means and appliances of defense." *McVeigh v. U. S.* 1870, 11 Wall. 259, 267, citing *Bacon's Abridgment, Tit. Alien, d.*; *Story's Equity Pleadings*, Sec. 53; *Albrecht v. Sussmann*, 2 Vesey & Beam, 323; *Dorsey v. Kyle*, 1869; 30 Md. 512, 522; 96 Am. Dec. 617; Cf. *Pollock on Contracts*, 8th ed., p. 100.

3. Sir William Plender's alleged embargo, fols. 44-63, on the payment of drafts by Austrian banks, was much emphasized by the respondent's counsel in their brief below. They seem to have misconceived the power and authority of Sir William Plender and the scope of his alleged embargo.

The question of Sir William Plender's powers arose in the case of *Cooper v. Deutsche Bank of*

Berlin, in the Glasgow Sheriff Court, decided 20 November, 1914, and reported in *Trotter's Law of Contract During War*, p. 452. That case was offered in evidence at the trial. It held that Sir William Plender's alleged embargo, if it existed, was *ultra vires*, because he was authorized to refuse only such payments as appeared to him to be contrary to the interest of the nation, and as the Sheriff's Court wisely remarked, *Trotter*, p. 452:

"It could never be suggested that it was contrary to the national interest that a British creditor should recover a debt due to him by a foreign debtor albeit that debtor was also, as it happened, at the moment an alien enemy."

A similar situation arose in the case of *Leader, Plunkett & Leader v. Direction Der Disconto-Gesellschaft*, 31 T. L. R., 83 decided in the King's Bench Division, by Mr. Justice Scrutton, on November 26, 1914.

In that case the plaintiffs, who were solicitors, had an account with the defendants' head office at Berlin. On August 1 they asked the head office at Berlin to remit their credit balance. This was refused, and after the outbreak of war, they served a writ on the London branch of the bank. The plaintiffs obtained judgment. The defendants appealed. Mr. Justice Scrutton gave judgment for the plaintiffs, holding that service on the London branch was good, and further that as

the defendants had entered a general appearance and only subsequently tried to limit their appearance by a letter stating that the appearance was for the branch only, they must be held to have appeared generally. That also is a point of interest in the present case.

In the Plunkett case the bank itself was the defendant.

In the present case, the reason that the libelant was unable to proceed in the English Courts was that it could not get jurisdiction over any property or funds of the respondent in England. If it had been able to do so, it could have prosecuted its action to judgment there under the authority of the decision quoted.

The situation in this regard was very clearly stated by Vice Chancellor Stevens in the remarks quoted above from the opinion in the case of *Compagnie Universelle de Telegraphie et de Telephonie Sans Fils v. United States Service Corporation, et al.*, where he said, page 95, Atl. Rep., 190:

"These citations demonstrate that even in the view of the belligerents themselves, contracts entered into before the beginning of hostilities continue in force during the war; that they may be sued upon, if to the disadvantage of the alien enemy defendant; that the alien enemy may always defend and that he may, in exceptional cases, sue."

4. In the libelants' brief in the Court below, it was urged that the libelants were prevented by their own law from collecting any money paid into the London Branch of the Laender Bank to meet the drafts.

This contention, as we have shown, is erroneous. Even if correct, however, it would not help respondent. It is not alleged that any particular fund was set apart to pay these drafts. But even if there was, that would not alter the situation. A debtor may not be excused by the plea that he has lost his money or that it has been taken from him. The creditor's right to secure a judgment is not affected by the fact that a third party has taken his debtor's funds in whole or in part.

Furthermore, the alleged act of the British Government, not being instigated by the libelant, may not be imputed to it.

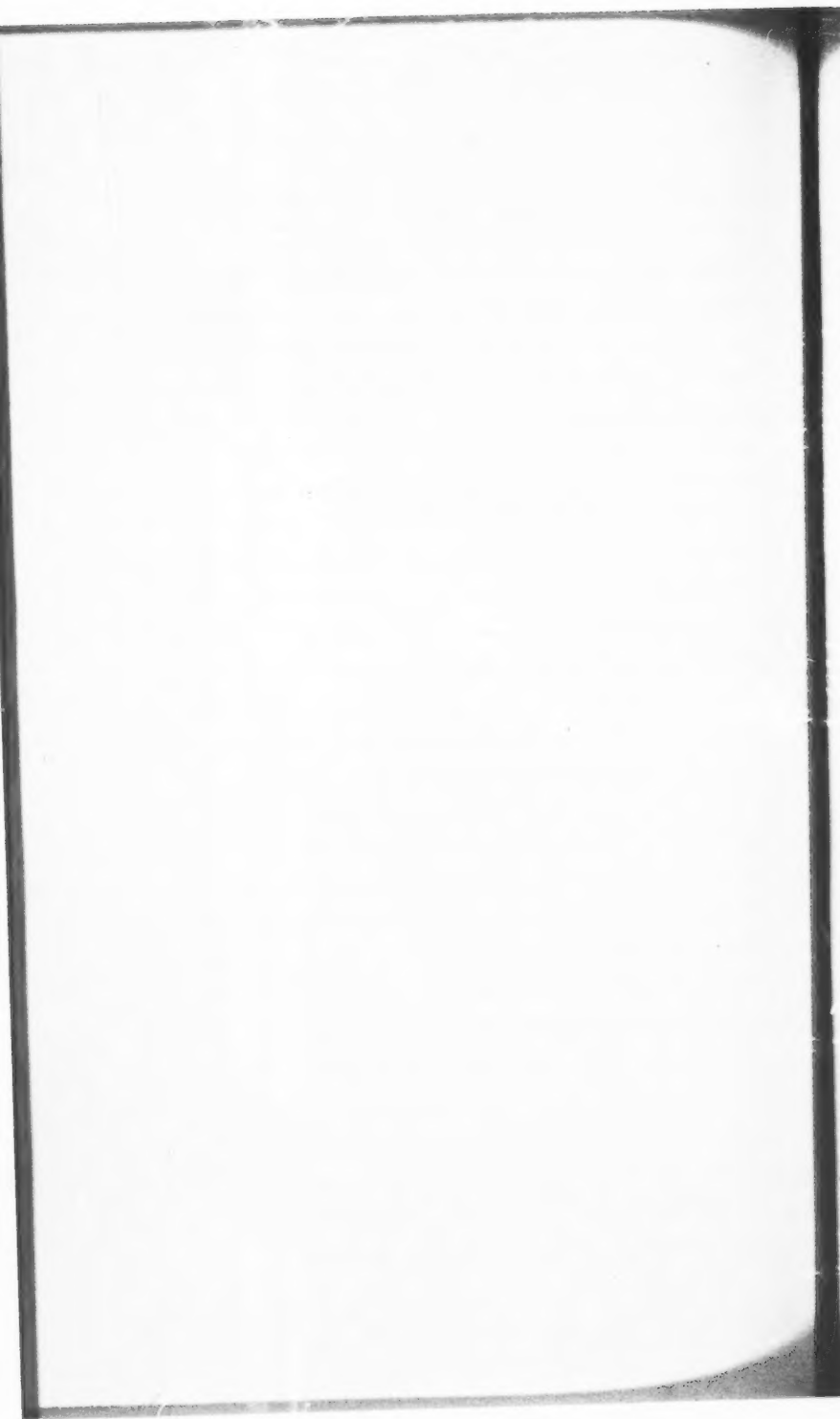
This case involves a private debt and private parties only. The debt has been admitted. The debtor has submitted himself to the jurisdiction of our Courts by general appearance, but the Courts have, without justification, refused to adjudicate the case and allowed the respondent to escape the results of his appearance.

LAST POINT.

THE PETITION SHOULD BE GRANTED AND A MANDAMUS SHOULD ISSUE AS PRAYED IN THE PETITION, OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI SHOULD ISSUE TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AS PRAYED IN THE PETITION.

Respectfully submitted,

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
Of Counsel.



Office Supreme Court, U. S.

FILED

JUN 2 1916

JAMES D. MAHER

CLERK

United States Supreme Court,

OCTOBER TERM, 1915.

No.

1043

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WATTS, WATTS & COMPANY, LIMITED,
An English Corporation,

Libellant-Petitioner,

against

UNIONE AUSTRIACA DI NAVIGAZIONE, etc.,
An Austrian Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF MANDAMUS OR WRIT OF CERTIORARI.

CHARLES S. HAIGHT,

Counsel for Respondent.



United States Supreme Court.

WATTS, WATTS & COMPANY, LIMITED, an English corporation,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGAZIONE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR WRIT OF CERTIORARI.

Statement.

1. In this case the libelant-petitioner is a British corporation, the respondent an Austrian corporation, and prior to the filing of the libel these nations were at war with each other. Before the war broke out, the respondent pursuant to an annual coaling contract had given the libelant drafts payable in London, in return for coal supplied to it in Algiers. The contract, therefore, was made by foreigners, in a foreign land, to be performed in a foreign land.

2. Owing to the war, both Great Britain and Austria-Hungary have passed laws forbidding their citizens to make payments to the citizens of

the other nation. Had the positions of the parties been reversed, the payment of any sum by the libelant to the respondent would have rendered the libelant, under English law, on conviction on indictment, liable to penal servitude "for a term not exceeding seven or less than three years" and a fine (Ex. 20, fols. 295-319). Under Austrian law, if the respondent makes a payment to the libelant the penalty is imprisonment of from one month to a year, and a fine of 50,000 kroners may be imposed in addition (fols. 322-324, 332-333).

3. As a war measure, on August 13, 1914, the British Government put Sir William Plender in charge of the London branch of the Laenderbank, through which the respondent had made arrangements to have the drafts paid, and he was given absolute discretion "to refuse to permit any payment that may appear to him to be contrary to the interest of the nation" (fol. 49). He issued a statement, in force at the time that this case was presented to the District Judge, that "domiciled bills" (to which class libelant's bills belonged) could not be paid (fol. 62). Therefore, the money which the respondent had in the Laenderbank in London could not be used to pay its drafts. One of the drafts when presented for payment was endorsed "We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present" (fol. 127), and all subsequent drafts (the great majority) were merely endorsed "No advice" (fols. 132, 138, 151, 163, 175, 187, 199, 211, 223, 235, 246).

4. Owing to the retaliatory measures of Great Britain against Austria and of Austria against

Great Britain in regard to financial transactions, it became impossible for the libelant to collect the drafts which would otherwise have been paid in ordinary course, and the libelant accordingly filed a libel in the United States District Court, in an effort to do indirectly what it could not do directly. The parties stipulated as follows (fol. 67):

“By reason of the proclamations in force within the jurisdiction of the said belligerent Powers hereinbefore referred to and of others which may hereafter be referred to, the above-mentioned drafts amounting to the sum of £8641:9:9, and the above-mentioned sum of £8:3:6, amounting in all to £8649:13:3, with interest thereon from the due dates of the several drafts still remain unpaid notwithstanding that respondent herein has been at all times ready, able and willing to pay the same.”

The natural inference, therefore, is that money was not lacking when the drafts were presented, and this inference is made almost conclusive by the letter of Sept. 19, 1914 (Ex. 25, fols. 347-351) in which the respondent wrote the libelant as follows (348):

“We have accepted several drafts for Bunker Coal supplied to our ships, which, *failing advice from our London Bankers, seem not to have been paid up to now.* The whole amount of the drafts accepted with payment due up to September 29th, 1914, is: Lst. 8,641.9.9.

“Of course, it goes without saying, that we wish to confirm our liabilities for the payment of these amounts.

“The legal dispositions taken by the British and Austrian Government (Mora-

toria) prevent us, however, to fulfill our original undertaking."

This letter, certainly does not indicate that before Aug. 7th the respondent had stopped the payment of the draft which was presented on that date, or that non-payment was due to any failure to have a sufficient balance in the London branch of the Laender Bank. On the contrary, it was only because the respondent had received "no advice" from their London bankers that they reached the conclusion that payments had not been made, due to the "legal dispositions taken by the British and Austrian Government."

5. The respondent's steamer *Martha Washington* was attached on the suit of libelant, and, owing to the Austrian prohibition against contract with enemy aliens, no bond was filed and the steamer was held by the marshal.

6. Owing to the war and the consequent interruption of all communication with Austria the best arrangement that the respondent could make for the trial was to enter into a stipulation which represented a compromise and about the meaning of which the libelant and respondent disagree.

In the petition and on page 1 of its brief, the libelant has sought to give the impression that there is no issue of fact in the case. The libelant also states that the respondent admits that the amount claimed in the libel is *due*, and also admits the jurisdiction of the Court. These statements are very misleading. While certain facts have been stipulated, as already stated, the parties do not agree upon the construction of the stipulation. The respondent contends that ample funds were provided in the Laenderbank in London to pay

the drafts, and that it was merely due to the action of Sir William Plender that these drafts had not been paid, down to the time when the stipulation was made. The respondent accordingly maintains that the drafts have never been dishonored, within the meaning of the original contract of the parties, and that the effect of the acts of the belligerents is to suspend these obligations during the war. While, therefore, the respondent admits that an original debt for the amount claimed in the libel was incurred, it does not admit that such a sum is now due and payable, except through the drafts which were given in accordance with the contract, payment of which has been stopped by the action of the British authorities.

The respondent admitted that the District Court had the legal authority to hear the case, but it did not admit that the Court, in its discretion, ought to exercise that authority. On the contrary, the respondent prayed in the answer that "judgment be rendered in the premises in accordance with the allegations and proofs which shall be submitted by libelant," and, upon the trial, the District Court was asked, in its discretion, not to take jurisdiction of the case. After careful consideration, that view was adopted by the Court and the decree refusing to take jurisdiction was affirmed by the Circuit Court of Appeals.

In its petition the libelant is now asking this Court to issue a writ of mandamus to compel the District Court and the Circuit Court of Appeals to take jurisdiction of a claim under a contract between foreigners, made abroad and to be performed abroad, although both Courts have held, as is indisputably true, that jurisdiction under

such circumstances is a matter of discretion and that in their judgment it should not be exercised. In the alternative, the petitioner asks that a writ of certiorari issue to review the action taken by the Courts below. This alternative relief prayed for is only a little less surprising than the request for a writ of mandamus, since this Court has long held that it is not called upon to review cases which involve merely questions of the exercise of the discretion of inferior Courts, unless that discretion clearly has been abused.

The reason advanced for making such an unusual application is that *other similar claims* are pending and that it will be convenient if this Court will lay down one rule which must be followed by the lower Courts everywhere.

This, then, is not merely an attempt to induce this Court, in the case at bar, to impose its will upon the District Court for the Eastern District of New York and upon the Circuit Court of Appeals for the Second Circuit. On the contrary, it stands out as an attempt to obtain a ruling which shall be applicable to cases still unheard and which shall require all Courts to hear all cases between belligerents no matter what injustice may be done thereby.

FIRST POINT.

When the lower court has exercised its discretion, without abuse, its judgment will not be disturbed.

The libellant in its first point (pp. 3-37), argues that the District Court was required to take

jurisdiction, merely because it had the power to do so. Fault is found with the respondent for admitting that the Court had this power, and at the same time asking that the Court should not exercise it, on the facts presented. The argument is fallacious. If the Court must take jurisdiction, against its better judgment, merely because it has the power to do so, there is no discretion whatever.

On page 6 of the libelant's brief it is stated that the Court, of its own motion, refused to take jurisdiction. This suggests the idea that both libelant and respondent were anxious to have the Court try the case, but that the judge would not hear it. That, of course, is contrary to the fact.

It is a difficult matter for the libelant to avoid the inevitable conclusion that this Court will not review a mere exercise of discretion by the District Court. In the libelant's brief, therefore, it is argued (pp. 8-15), that the cases in which the Court has exercised its discretion in the past, in refusing jurisdiction, represent all of the cases which ever can arise in which this discretion may be exercised. That would be an absurd limitation to put upon the Courts. They should continue in each case between foreigners, in connection with contracts to be performed abroad, and made abroad, to decide on the facts of each case whether it is proper and will promote justice to take jurisdiction. This principle is clearly stated in *The Maggie Hammond*, 76 U. S. 435, and *The Belgenland*, 114 U. S. 355, the leading authorities cited by libelant.

In the course of the opinion in *The Maggie Hammond*, the Court says:

“Process having been duly served in the district where the ship was found and where

the libel was filed, the jurisdiction of the district court is without any well founded legal objection. In this country, says Mr. Parsons, it seems to be settled that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, *but the question is one of discretion in every case*, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum. 2 Pars. Ship., 226; *The Johannes Christoph*, 2 Spink. Adm., 98; *The Jerusalem*, 2 Gall. 191; *The Aurora*, 1 Wheat., 96; *Taylor v. Carryl*, 20 How., 611 (61 U. S. XV 1038; *The Gazelle*, 1 Sprague, 378" (italics ours).

In the course of the opinion in *The Belgenland*, the Court says:

"But although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*—that is, where they arise under the common law of nations—special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; *the only question will be whether it is expedient to exercise it*" (italics ours).

Both of these statements of the law make it clear that "the question is one of discretion in every case." In the case at a bar a controversy *communis juris* has been modified by the war statutes of belligerent nations.

In the last subdivision of Point I of the libellant's brief (pp. 15-26), a fine-drawn argument is

given as to whether it is or is not a matter of comity for our Courts to refuse jurisdiction. Such a discussion we believe to be unprofitable. In the exercise of the Court's discretion it is merely a question whether it is expedient to take jurisdiction in each case.

The application for a writ of Certiorari must, therefore, be denied.

SECOND POINT.

A writ of mandamus should not be granted.

The libellant's second point is that an appeal to the Circuit Court of Appeals is a trial *de novo*, and that consequently the Circuit Court of Appeals should have exercised its discretion anew about taking jurisdiction, uninfluenced by the decision of the District Judge. The claim is made that the opinion indicates that the Circuit Court of Appeals did not exercise its discretion and that consequently it ought to be compelled, by a writ of mandamus, to hear the case again.

It is important, in the first place, to consider the nature of the decision in this case. All that the District Judge did was to refuse, in his discretion, to hear the case.

It must be admitted that the question which the District Court decided was a matter of discretion. As already shown, the decisions of the United States Supreme Court are clear upon that point, and it is equally clear that the exercise of discretion will not be disturbed, on appeal, unless that discretion has been abused.

Thus in *Earnshaw v. the United States*, 146 U. S. 60, this Court was considering whether an inferior tribunal had given proper notice to a defendant, and, after considering various cases where a trial court had exercised its discretion, said:—

“The question in all these cases is whether in respect either to the notice of the trial, adjournments, allowance of pleas, the reception of testimony, or other incidental proceedings the court has or has not acted in the exercise of a sound and reasonable discretion.”

In *Sun Cheong-Kee v. United States*, 3 Wall. 320, the Court said:—

“Exceptions were taken to various rulings in the progress of the cause, and are made part of the record. The first two related to matters wholly within the discretion of the circuit court, and are not reviewable here. This is not merely settled by repeated decisions, but is expressly directed by an Act of Congress prescribing the limits of this court’s jurisdiction upon writs of error to the Circuit Court of California. Act of Feb. 19, 1864, ch. 11 (13 Stat., 7).”

The Act of Feb. 19, 1864, referred to, is substantially the same as §700 of the Revised Statutes of the United States, now in force.

See also *Silsby v. Foote*, 14 How. p. 218.

That this Court considers that the question whether the District Court should or should not take jurisdiction is for the *District Court* to pass upon, and that the discretion of the District Court will not be disturbed unless it has been abused,

appears from the case of *The Belgenland*, *supra*. That was a case of a collision between foreign vessels, where the District Court, in its discretion, took jurisdiction. The Circuit Court heard the case on appeal, and later heard a special re-argument on the question of jurisdiction. Yet this Court, in approving the exercise of discretion on the part of the District Court, dealt with the District Court entirely, and rested its conclusions on the proper use of the *discretion of that Court*. Mr. Justice Bradley, speaking for the Court, said:—

“As the assumption of jurisdiction in such cases depends so largely *on the discretion of the court of first instance*, it is necessary to inquire how far an appellate court should undertake to review its action. We are not without authority of a very high character on this point. In a quite recent case in England—that of *The Leon XIII*, 8 Prob. Div., 121—the subject was discussed in the court of appeal. That was the case of a Spanish vessel libeled for the wages of certain British seamen who had shipped on board of her, and the Spanish consul at Liverpool protested against the jurisdiction of the admiralty court on the ground that the shipping articles were a Spanish contract, to be governed by Spanish law, and any controversy arising thereon could only be settled before a Spanish court or consul. Sir Robert Phillimore held that the seamen were to be regarded for that case as Spanish subjects, and under the circumstances he considered the protest a proper one and dismissed the suit. The court of appeal held that the judge below was right in regarding the libelants as Spanish subjects; and on the question of reviewing his exercise of discretion in refusing to take jurisdiction of the case, Brett, M. R., said: ‘It is then said that

the learned judge has exercised his discretion wrongly. What, then, is the rule as regards this point in the court of appeal? *The plaintiffs must show that the judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the court of appeal holds, that they are justified in saying he has exercised it wrongly.* I cannot see that any wrong principle has been acted on by the learned judge or anything done in the exercise of his discretion so unjust or unfair as to entitle us to overrule his discretion.'

This seems to us to be a very sound view of the subject, and acting on this principle we certainly see nothing in the course taken by the *district court* in assuming jurisdiction of the present case, which calls for animadversion." (Italics ours.)

Similarly, in *The Dos Hermanos*, 10 Wheat, p. 306, a salvage case, decided when the right of appeal to the Supreme Court existed in admiralty cases, Chief Justice Marshall said, pp. 310 and 311:—

"In the present case, the district court has awarded one-half of the prize proceeds, or salvage, to the captors. It was an exercise of sound discretion; and this court would, with extreme reluctance, interfere with that discretion, unless in a very clear case of mistake. We perceive no such mistake in this case, and are well satisfied with the amount of the salvage as decreed by the district court."

Moreover, there is nothing in the case to lead one to conclude that the Circuit Court of Appeals did not exercise its full powers in passing upon the questions involved in this case. It cannot be supposed that that Court is ignorant of the prin-

ciple that an admiralty appeal is a trial *de novo*.

The first two cases cited for this proposition on the libellant's brief—*Irvine v. Hesper* (brief, p. 28) and *Munson S. S. Line v. Miramar S. S. Co., Ltd.* (brief, p. 29) were cases decided by the Circuit Court of Appeals for the 2nd Circuit, the latter case being decided as recently as 1909. The whole record, in the case at bar, came before the Court of Appeals, and the case was fully briefed and argued. It is well-settled, however, in trials *de novo* that, where the trial Court exercises discretion, the Circuit Court of Appeals, like this Court, will not overrule the discretion of the District Judge, unless that discretion has been abused.

In *The Eliza Strong* the Circuit Court of Appeals for the 6th Circuit said, 130 Fed., p. 99, at p. 101:—

“If the matter of the amount of a salvage award, and its distribution between owner and crew, were not one so largely dependent upon the exercise of a sound judicial discretion, we might be disposed to regard the reward as somewhat meager. But neither the amount of the award, nor the method of distribution, is so unsatisfactory as to justify a disturbance of the decree, under the well-settled rule of this court not to set aside a salvage award on account of its amount unless we are plainly convinced that the discretion of the trial judge has been manifestly abused. *The R. R. Rhodes*, 82 Fed. 751, 27 C. C. A. 258; *The H. E. Runnels*, 82 Fed. 755, 27 C. C. A. 183.”

There is no reason for supposing that the judges in the 6th Circuit in the *Eliza Strong* case did not know that an admiralty appeal is a trial *de novo*, or that they did not properly exercise

their functions because they refused to disturb a salvage award, unless they were plainly convinced "that the discretion of the trial judge had been manifestly abused." The judges of the Circuit Court of Appeals in the case at bar acted on similar principles when they affirmed the decree "as no abuse of discretion appears."

In *Bearse et al. v. Three hundred and forty Pigs of Copper*, 2 Fed. Cases, p. 1192, Judge Story said at p. 1195:

"The allowance of salvage rests in the exercise of the sound discretion of the Court and it would be most mischievous to the interest of all concerned, and would encourage protracted litigation, and in some cases ruinous expenses to the parties, if, where that discretion is fairly and reasonably exercised, the Appellate Court should entertain jurisdiction; and because it might not originally have arrived at exactly the same conclusion as to the rate of salvage, in the exercise of its own discretion, therefore it should reverse the decree of the inferior court."

We believe that the above discussion closes the case and that the balance of the brief is unnecessary, but, should this Court care to review the facts and consider the case *de novo*, we submit that the District Court not only should not but could not have properly entertained this suit because the debt was suspended during the war.

THIRD POINT.

The Courts below properly declined to adjudicate this case.

A. IRRESPECTIVE OF WAR COMPLICATIONS, THE COURT WOULD HESITATE TO TAKE JURISDICTION OF THIS CASE, OVER THE RESPONDENT'S OBJECTION.

Where an action is brought by a non-resident against a non-resident, in connection with a contract which is made outside of the United States, to be performed outside of the United States, the District Court, in its discretion, ordinarily does not take jurisdiction if one party objects. A leading case on this question is *Goldman v. Furness, Withy & Co.*, 101 Fed. 467, decided in the Southern District of New York. In that case, on the objection of the learned counsel for the appellant in this case, Judge Brown was not willing to take jurisdiction merely because the foreign libellant found it more convenient to sue here, and he also refused to take jurisdiction after the claim had been assigned to a resident of New York.

If there were no war complications in the case at bar, the learned District Judge would have had the clear right, in his discretion, to refuse to take jurisdiction, and that discretion, once exercised, would not be reversed by this Court merely because the appellant so wished.

Not only are all of the reasons of convenience opposed to the trial, in American Courts, of cases involving contracts which are made and to be performed exclusively in foreign countries, but an American Court is not the appropriate forum to pronounce upon questions of foreign law, especially where the parties are all foreigners.

The difficulties connected with questions of foreign law are always embarrassing. The libellant, while contending that Algerian Law should govern the case (Brief, p. 41) has offered a list of cases in Trial Exhibit 2 (fols. 353-359) which were supposed to prove the English law, but this is an unsatisfactory method of doing it. Selected cases may give a one-sided view of the law. The respondent believed it impossible to prove the Austrian and Algerian law by a similar method. In cases of doubt the Court should be slow to assume that the law of these countries is the same as that of the United States.

Cuba R. R. v. Crosby, 222 U. S., 473.

The statement that it is undisputed that the law of Algiers is the same as the law of France, and that under it, payment is due from respondent to libellant, (Libellant's brief, p. 41) is entirely erroneous. No admission of the law of Algiers has ever been made nor has that law been proved by either side.

B. THE COMPLICATIONS OF THE WAR HAVE STRENGTHENED AND EMPHASIZED THE REASONS FOR REFUSING TO TAKE JURISDICTION.

(1) *The effect of war upon the property of belligerents and their rights of intercourse.*

In order to decide what effect the present war has upon the question of the assumption of jurisdiction by a United States Court, it is necessary to consider, in the first instance, the radical changes in property and in contract rights which are brought about by a declaration of war.

In former times all property of the enemy, private as well as public, including enemy debts, was subject to confiscation on the outbreak of war. In recent times it has been *customary* to confiscate only property at sea, the last confiscation of private property on land being that at the outbreak of war between France and Great Britain in 1793. But there can be little question about the right of a belligerent to confiscate every kind of enemy property within its reach, on land and on sea. The only difference between the two kinds of property is that the declaration of war itself makes property at sea subject to confiscation without any law declaring it subject to seizure, whereas a belligerent nation must pass such a law before it can legally confiscate property on land.

In *Brown v. U. S.*, 8 Cranch 110, Mr. Chief Justice Marshall said (pp. 122 to 124):

“Respecting the power of government no doubt is entertained. That war gives to the sovereign *full right* to take the persons and confiscate the property of the enemy wherever found, is conceded. * * *

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, *but simply confers the right of confiscation* * * *.

The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and on other property found within the country must be the same” (*Italics ours*).

In *The Rapid*, 1 Gallison, 295, Mr. Justice Story said:

“War puts every individual of the respective Governments, as well as the Governments themselves, in a state of hostility with each other. *All treaties, contracts, and rights of property are suspended*” (Italics ours).

It is clear, therefore, that the rights and liabilities of the parties in the case at bar have been vitally altered by the declaration of war. “Their contracts and rights of property are suspended”, and, in addition, the Austrian Government has the clear right to confiscate the credits of the libelant, by ordering the respondent to pay to the Austrian Government itself, the amount due the libelant. Such a confiscation would have the same effect as the confiscation of one thousand bales of cotton belonging to the libelant and lying on the dock at Trieste, *i. e.* the cotton would be irrevocably lost. So also the confiscation of the credit would destroy the right of the libelant to recover from the respondent.

(2) *A decree ordering payment would be an infringement of Austria's rights to confiscate.*

As already stated, it is well settled law that the Government of Austria has the right to confiscate this credit which belonged to the libelant at the outbreak of the war, and she can exercise that right *at any time during the war*. A more humane practice has, for some time, prevailed, and has been followed by Austria in this case by merely declaring the Austrian's citizen's debt *suspended*. But the vital end to be accomplished by both confiscation and suspension is to prevent a citizen of

Austria from paying any money to the enemy. The greater power includes the less, and Austria's power to confiscate the debt, and thus prevent money from reaching its enemy includes the power to forbid the payment of the debt and so prevent money from reaching its enemy. If this power is to be effective it must be respected by the courts of foreign nations.

If Austria had confiscated this credit, it is clear that this Court would not order the respondent to pay a second time. This would be both an injustice to the respondent and an interference with the hostile measures taken by the belligerents against each other. On the same reasoning, the Court should not interfere with Austria's right to confiscate this credit at a future date, or her right to follow the more lenient policy of proclaiming the respondent's duty and right to pay *suspended* until peace is again declared. If neutral countries are to compel Austrian citizens to make payments which they are forbidden by law to make, the only safe way of preventing Austrian money, not in England, from reaching that country will be for the Austrian Government to confiscate the credits of all citizens of the enemy countries.

(3) *This Court should not require the respondent to commit a crime against its own Government.*

As has been stated already, Austrian law has forbidden any payments to English citizens, during the war, and has enacted the penalty of imprisonment from one month to a year, and a fine of Kr. 50,000 if such a payment is made. England has similarly forbidden her citizens to make

payments to Austrians, and this is a part of the customary system of hostilities. It can hardly be supposed that this Court would undertake to order a foreign corporation, in such a case as this, to commit a crime against the laws of its own country. It might be said that, if this Court decrees the payment of this money and the Austrian corporation refuses to make the payment when such payment is decreed, and does no voluntary act to assist in the transfer of money to an English corporation, then the act of payment becomes the act of this Court, and the Austrian corporation will not be subjected to a fine, or its officers to imprisonment. Whether this is the law of Austria, or not, we do not pretend to know; but even if it were, the reasoning shows the impropriety of any such action by a Court of the United States. This Court certainly has no wish to be performing acts which are criminal according to Austrian law.

(4) *This Court should not compel a sacrifice sale of the SS. Martha Washington.*

From whatever point we approach this case, the undesirability connected with taking jurisdiction appears. At the present time the British will seize any Austrian vessel that puts to sea, and confiscate her. If the *Martha Washington* were sold and proceeded to sea, she would be captured and taken into a Prize Court. Under such circumstances, she could not realize her value under a Marshal's sale. This, in itself, is a reason quite as strong as any of the others given by Judge Brown in the case of *Goldman v. Furness, Withy & Co.* (*supra*) why the District Court should not take jurisdiction.

In refusing to take jurisdiction in a case of this character, the Court would not be showing any discrimination. Manifestly, jurisdiction would be declined, whatever the nationality of the citizen of the belligerent who requests it.

(5) *The United States Courts have always refused to interfere between belligerents.*

The status of a debt due by one belligerent to another is that of enemy property in the debtor's country, and, as has been already stated, may be confiscated as such. In the present case this Court is really asked to pass upon the war measures of Austria as they relate to this property.

It is well settled, as regards matters of prize, that this Court will not pass upon any question relating to the title of belligerents, unless its own neutrality is involved, and in that case it will only pass on the question connected with its neutrality.

The Estrella, 4 Wheat. 298.

In that case the neutrality of the United States had been violated because the crew of the vessel making the capture had been increased within the United States by enlisting men there. On that ground the Court held that the prize should be restored to her original owners. In that connection the Court said, at pp. 308-309:

“A neutral nation, which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own courts, of the validity of every capture made under their respective commissions, and to decide on every question of prize

law which may arise in the progress of such discussion. But it is no departure from this obligation, if, in a case in which a captured vessel be brought or voluntarily comes, *infra praesidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture."

In *L'Invincible*, 1 Wheat, 238, a claim was presented against the ship *Invincible*, which was a French privateer, just captured by Americans, for an alleged wrongful capture of the American ship *Mount Hope*, while the *Invincible* was under the French flag. The Supreme Court refused to pass on any act of the *Invincible*, committed while she was a French privateer, and said that to do so "would have been a deviation from that strict line of neutrality which it is the universal duty of neutrals to observe—a duty of the most delicate nature with regard to her own citizens, inasmuch as through their misconduct she may draw upon herself the imputation of secretly supporting one of the contending parties. Under this view of the law of nations on this subject, it is evident that it becomes immaterial whether the *corpus* continue *sub potestate* of the capturing power, or not."

The same reasoning which induces our Courts to refuse to interfere in cases of capture will cause them to refuse to interfere with those retaliatory measures which both England and Austria have adopted, in this case, to prevent the citizens of one country from paying money to those of the other.

In *Rederei Actien Gesellschaft Oceana v. Clutha Shipping Company, Limited*, a case decided by Judge Rose in July, 1915, in the District of Mary-

land, 226 Fed. 339, the learned counsel now acting for the appellant represented the respondent and asked that the Court refuse jurisdiction. There suit had been brought by a German corporation against an English corporation for a portion of freight due under a charterparty. The libelant, the German company, had negotiated this charterparty before the war, by which respondent's steamship was to carry cargo for another English corporation, and in consideration thereof it had been agreed that libelant should receive part of the freight as soon as earned. The vessel earned this freight after the war had broken out, and the libelant sued to recover its share of the freight and attached the English Company's steamship, *John Hardy*, in Baltimore, Md. The Court carefully considered the question whether, under such circumstances, it should, in its discretion, take jurisdiction of this claim between the citizens of belligerent nations, and held that it should not. The Court also held that the agreement that the libelant should share in the freight earned amounted to an agreement for a commission, and so, irrespective of the questions involved in belligerent rights, the libelant ought not to recover, in an Admiralty Court.

On the question which is of interest to us here, Judge Rose said (p. 343):

"This suit is between foreigners. It is over a contract made and on both sides to be wholly performed in Scotland. The only connection it has with this country is that the time of payment was fixed by an event which took place here. There are many reasons why in war-times neutral courts should, so far as their duty permits, decline the task of settling disputes between the subjects of hostile nations. This is especially true when to deter-

mine the controversy it is necessary either to enforce or to refuse to enforce legal rules which come into operation in case of war only and to which each of the warring Powers habitually makes exceptions when it thinks it for its own interests so to do. If a court of admiralty has ever the right in the exercise of its discretion to decline jurisdiction, it should do so in such a case as this."

If our courts once undertake to adjudicate between the citizens of the many belligerent nations of Europe, the cases which cannot be tried in the natural and appropriate courts because of enemy alien laws, the resulting complications cannot be foreseen.

On the 31st day of July, 1914, New York learned what it meant to have the only Stock Exchange in the world, which was open, and it would be scarcely less difficult if we should undertake to maintain the only courts in which belligerents can sue. Contracts between Turks and Russians, for instance, governed by laws and customs wholly unlike our own, would not only be difficult for our courts to construe, but, with witnesses utterly unable to appear before the courts, direct injustice would be almost unavoidable, and our self-imposed duty of adjudicating for the whole world would be likely to lay us open to just criticism from all sides.

FOURTH POINT.

To have taken jurisdiction would have amounted to an abuse of discretion.

As already argued, the fact that the District Court in its discretion declined to take jurisdic-

tion should, in itself, be decisive, since that discretion was not abused. We believe, however, that we can go further and say that the discretion would have been abused had the Court taken jurisdiction. The only case cited for the proposition that a neutral nation will entertain a suit between citizens of belligerent nations, during war, is *Compagnie Universelle de Telegraphie v. United States Service Corporation, et al.*, 95 Atl. Rep. 189 (Libelant's brief, pp. 21-26), which was a case relating to land in the United States and, as we believe, not in point.

In that case a bill in equity was filed to compel the specific performance of a contract to convey land at Tuckerton, New Jersey; also for the transfer of certain patents used in connection with a telegraph station on that land. The contract had been signed by one Goldschmidt, on behalf of a German corporation. Patents in the United States had been issued to Goldschmidt, who was a defendant in the case. Meyer, another defendant, was in possession of the plant. The plant had been completed and paid for, and nothing remained but to turn it over to the plaintiffs. The following facts should be noted:

1. The contract was not to be performed in the country of either belligerent but in the territory of the United States,—a neutral nation.

The two cases, therefore, are absolutely different in this vital particular. In the case at bar jurisdiction would ordinarily be refused, if either party objected, because the contract was made by foreigners, outside of the United States, and to be performed outside of the United States. If the entire performance of the contract is to take place within the United States, the Courts of the

United States ordinarily take jurisdiction. This difference between the two cases is emphasized by Vice-Chancellor Stevens in his opinion (p. 190):

“The laws governing real estate are best understood here. The subject matter of the controversy is here and the transfer of the title takes effect here. Under our statute, aliens have the same right to acquire, hold and dispose of land as citizens have and to give effect to this right they must have the same remedies.”

2. The New Jersey Court was the only appropriate Court to declare specific performance of the contract (cf. §982, New York Code of Civil Procedure; 3 Compiled Statutes of New Jersey 1709-1910, p. 3412). No foreign nation can interfere with the sovereign powers of New Jersey to pass upon matters connected with its own land. On the other hand the situs of the debt in the case at bar was the residence of the Austrian debtor.

This point is a development of the preceding point, and shows that no Court, except the New Jersey Court, could give adequate remedy to the parties. Other Courts could merely direct the defendant to execute a deed, but, if he refused, they could not deal with the land itself. This, by itself, is a very strong reason why the New Jersey Court should take jurisdiction.

3. The main purpose of the retaliatory acts of belligerent nations, is to prevent the resources of one nation from going to the other. But land, after its transfer, must remain in the neutral country. Because of its nature, it can not be sent to France.

Thus the bill of complaint shows that this land was in the possession of one of the defendants,

and in carrying out a decree of specific performance, possession would have to be given to someone in the State of New Jersey. The laws of New Jersey give aliens a right to acquire title to land, and its Courts are open to them to enforce their rights in regard to such titles. If a New Jersey Court refused to enforce a contract in regard to land situated in that State, on the suit of a French corporation, it might well be a matter of international complication, involving this country. The Vice-Chancellor, in the course of his opinion, said (p. 190):

“The present controversy concerns title to land in New Jersey. This is a subject over which the New Jersey Courts have almost exclusive control. In no other jurisdiction can complete relief be afforded;—relief that will operate on the land itself and not merely on the person of the title holder. Defendants’ counsel rely upon a class of cases in which it is held that the Court, in the exercise of a sound discretion may refuse to entertain jurisdiction of a controversy between aliens. These are cases of tort occurring on the high seas or elsewhere outside of the jurisdiction, or cases of contract made and to be performed abroad. If the Court be of opinion that justice can better be administered in the courts of the domicile of the suitors, it requires them to go there. They are not authorities for the proposition that the Court may refuse to try title to land lying within its jurisdiction if the suitors be aliens.”

In an article published in the *Central Law Journal* of September 24th, 1915, a quotation is given from Judge Veeder’s opinion and a further quotation from Vice-Chancellor Stevens’ opinion, in which the language is unnecessarily broad. In

summarizing these quotations, the article says (p. 218):

"It seems to us that, boldly stated as the matter is in both of the excerpts we make, the federal court has the better of the argument. The New Jersey court would have better placed its conclusion to entertain jurisdiction on the ground that the right of action acquired by the French corporation related to a 'right to New Jersey land,' a right that lay wholly outside of control by German law and it was of no concern to this country what the effect of such enforcement might be. Pivoting jurisdiction on this one fact, all of the consequences of its exercise would be swallowed up in its exercise. Indeed, in the face of such a fact in the New Jersey case, there was no question of rights of alien subjects, belligerent or non-belligerent, involved. In the federal case there was such a question, because the contract itself was foreign, and to it the restrictions of foreign law prevailed and its binding force during war applied."

4. Moreover, Vice-Chancellor Stevens' decision is not to the effect that the District Court in the present case lacked the power to refuse to take jurisdiction in its discretion. Vice-Chancellor Stevens states as follows (p. 191)

"Judge Veeder dismissed the suit brought by Watts & Co. He seems to have treated it as one in which exercise of jurisdiction was discretionary, the parties, the contract and the attached vessel being all foreign. He seems to have thought that the pendency of the war and the laws and ordinances promulgated by the belligerents were good reasons for declining jurisdiction. Whether they were or not—and they do not seem to be very obviously so—the case is no authority for the proposition that this Court should refuse to

entertain a question of title to land in New Jersey."

It may be that with such consideration as he had given to the matter, Vice-Chancellor Stevens, when he wrote the opinion, stood ready to commit the Courts of this country to the task of trying every dispute between the citizens of the warring nations of Europe, where property can be attached in this country, but he certainly does not find that the United States District Court was *required* to take jurisdiction of a case arising under a contract made abroad, to be performed abroad, and between parties all of whom are foreign citizens.

5. The decision of Vice-Chancellor Stevens also calls for consideration in one other particular. He suggests that "It can hardly be assumed that it was the purpose of the German legislator to attempt to give extra-territorial force to its enactments or decrees respecting lands in foreign countries," (p. 191) and he closes his opinion with the following argument (p. 192):

As I have already shown, there is nothing in this legislation, disclosed at least by the plea, that prohibits the German subject from defending against a French claim. But suppose there were. If this Court gave effect to it, it would, in a measure, be enforcing German law, which on well settled principles can have no extra-territorial operation, to the detriment of the French citizen asking to be heard. This it seems to me would be an un-neutral act."

The argument that the prohibition placed by England and by Austria, upon the payment of any claim to an enemy, has no extra-territorial force, is exceedingly misleading if it is applied

to a case like the one at bar. The defendant in this case is an Austrian citizen, with its head office permanently located within the jurisdiction of Austria and subject to her control. For that reason the Austrian law, prohibiting payment during the war, is binding upon it. Similarly, the British act prohibiting trading with the enemy applies to Watts, Watts & Co., and prohibits any payment to the citizens of an enemy country, whether that payment is made in London, Vienna or New York. It is the substance of the payment itself which is prohibited, without reference to the place where the payment is made. This Court does not give extra-territorial force to a German law or to an Austrian law when it recognizes the fact that the defendant brought before the Court is absolutely prohibited, by the law of his own country, from paying the debt which is sued upon and is subject to heavy penalties if he does so.

The power of a government to prohibit its own citizens from doing any treasonable act beyond its own boundaries is well illustrated by the cases where the Courts of one State have restrained citizens of that State from bringing suit in another State or in a foreign country.

Thus, in the case of *Cole v. Cunningham*, 133 U. S. 107 (1890), it was held that a Massachusetts Court could, by bill in equity, enjoin a Massachusetts citizen from proceeding in an attachment suit in New York, the effect of which, if prosecuted, would be to give him preference over Massachusetts creditors in insolvency proceedings.

In *Riverdale Mills v. The Manufacturing Co.*, 198 U. S. 188 (1905), it was held that the Circuit Court for the District of Georgia could grant an

injunction against the prosecution of a suit in Alabama by a Georgia citizen.

In *French v. Hay*, 22 Wall. 250,—a similar case,—the Court said (p. 252):

“The Court having jurisdiction *in personam*, had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory.”

In *Dehon v. Foster*, 4 Allen (86 Mass.), 545, Bigelow, C. J. (p. 550), said:

“The authority of this Court, as a Court of Chancery, upon a proper case being made to restrain persons within its jurisdiction from prosecuting suits, either in the Courts of this State, or of other States, or foreign countries, is clear and indisputable.”

The same rule prevails in England. In the *Matter of the Belfast Shipowners Co.*, 1 L. R. Irish 321 (1894), an Irish Court of Bankruptcy, in an insolvency proceeding, made an order restraining a resident of England from prosecuting an attachment in Massachusetts, the effect of which would be to give him a preference. The order of the Vice Chancellor was affirmed by the Court of Appeals.

In *Lord Portarlington v. Soulby*, 3 M & K 104, Lord Brougham sustained an injunction restraining the prosecution of a suit in Ireland, and said (p. 108):

The jurisdiction “is grounded like all other jurisdiction of the Court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom

this order is made, being within the power of the Court."

The same power of a Government to control the acts of its citizens is illustrated by *Canada Southern R. R. Co. v. Gebhard*, 109 U. S. 527, decided by the United States Supreme Court in 1883, in connection with a payment to be made in a foreign country.

In that case the Canada Southern Railroad Company issued bonds, the principal and coupons of which were payable at the Union Trust Company in the City of New York. The Railroad Company became involved financially, and a reorganization scheme was considered and legalized by Act of the Canadian Parliament. Under this scheme the bondholders were to exchange old bonds for new, the payment of which was postponed, and were not to receive payment of certain coupons on the original bonds which had not then been paid. New York holders of bonds, who had not assented to this arrangement, sued in the Circuit Court of the United States for the Southern District of New York, to recover on the original bonds, the principal of which was then due. They claimed that the Act of the Dominion Parliament was not binding and was an impairment of the obligation of contracts. The situation, therefore, is very similar to that in the case at bar. Obligations payable in New York were modified by a statute of the country of which the debtor was a citizen, the statute being passed after the obligation was created. The Supreme Court held that, because the corporation was a corporation of Canada, the Legislature of Canada had a right to pass laws in regard to it, which were binding, even in connection with

payments to be made outside of the jurisdiction. In the course of the opinion the Court said:

“* * * every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.”

In like manner, it may be said that any Englishman who contracts with a citizen of Austria in times of peace knows that, if war breaks out, the citizen of Austria “must of necessity be controlled” by the laws of Austria. The contract is made with that understanding, and neither party to the contract should complain because payment of the debt is suspended by the laws of the belligerent governments when war does break out.

In the case at bar this Court could not, without an abuse of its discretion, require the respondent

to do an act which is admittedly made criminal by Austrian law, particularly since it cannot be questioned that the Austrian Courts have authority to enforce that law as regards the respondent, whose residence is in Austria.

FIFTH POINT.

The money sued for is not now due.

The effect of the war is to absolutely suspend the obligation to pay the debt now sued for, and consequently it is not due at the present time.

The doctrine that one is not obliged to perform a contract made before the war, when its performance has become illegal, is well established law, both in this country and in England. A leading case is *The Teutonia*, L.R. 3 A. & E., 394. In that case a German vessel had been chartered by an Englishman to carry cargo to a French port. War broke out between Germany and France, and the German vessel refused to carry the cargo. The English charterer sued the German owner in an English Court, and Sir Robert Phillimore held that the obligation of the German to perform the contract ceased when war was declared. At page 414 the Court said:

“The contract was no longer capable of being performed by the master ‘without (to use the phrase of Lord Ellenborough in *Atkinson v. Ritchie*) a *criminal compromise of public duty*; for I think it might be reasonably maintained that the prohibition was as stringent in the one case as the other, and that the same legal consequences flow from

either state of things. I think that on the 16th of July *The Teutonia* could not have entered Dunkirk with her cargo without being exposed to the penalties of trading with the enemies of her country."

The Privy Council affirmed the judgment (L. R. 4 P. C. 171-1871). Lord Justice Mellish, delivering the opinion of the Court, said (p. 181):

"The argument for the Appellants assumes, that the breaking out of the war rendered the performance of the charter-party illegal, and that, therefore, the contract between the parties was dissolved; and *there can be no doubt that the war did render it illegal for the Teutonia to enter any French port.*"

It is important to notice that the decision in this case was rendered by the Court of a neutral country—England—on the suit of an English charterer, and the Court held that one belligerent, the German owner, after war was declared, could not be compelled to carry out the contract, since it was unlawful *by the laws of Germany*, which forbade the ship to trade "with the enemies of her country."

The same principle of law is applicable to the present case, and that principle is the basis of numerous decisions in this country which hold that the obligations of the citizens of one belligerent to pay their debts to the citizens of another belligerent are *suspended* during the war, and, as a consequence, that interest does not run during the war.

The leading case on this subject is *Hiatt v. Brown*, 15 Wall. 177, decided in the United States Supreme Court in connection with the Civil War.

In that case action was brought to foreclose a mortgage given by a citizen of Kansas, a Northern State, in favor of a citizen of Virginia, a Southern State. The mortgage was made before the war. The Court held that the obligation to pay was suspended during the war, and that there was no "revival of the debt" and no obligation to pay interest until the war had ceased. Foreclosure was allowed, but interest for that period was deducted. The Court said (p. 185):

"As the enforcement of contracts between enemies made before the war is suspended during the war, the running of interest thereon during such suspension ceases. Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention, and it would be manifestly unjust to exact such compensation, or damages, when the payment of the principal debt was interdicted. The question whether interest should be allowed on such contracts during the period of war was much considered soon after the Revolution. In the case of Hoare v. Allen, 2 Dall. 102, decided in 1789 by the Supreme Court of Pennsylvania, it was held that interest did not run during the war on a debt owing to an enemy, contracted previously. 'Where a person,' said the court, 'is prevented by law from paying the principal, he shall not be compelled to pay interest during the prohibition.' The legislation of Congress after the commencement of the War of the Revolution, like the legislation of 1861, prohibited commercial intercourse with the inhabitants of the enemies' country, and the court observed that the defendant could not have paid the debt to the plaintiff, who was an alien enemy, without a violation of the positive law of the country and of the law of nations, and that parties ought not to suffer for

their moral conduct and their submission to the laws. The decision was followed by the same court in *Foxcraft v. Nagle* (2 Dall. 132), in 1791. Similar decisions were rendered by the Court of Appeals of Virginia and the Court of Appeals of Maryland.

The counsel for the complainant attempts to draw a distinction between those contracts in which interest is stipulated and those to which the law allows interest, and contends that *the revival of the debt* in the first case, *after the termination of the war*, carries the interest as part of the debt; while in the latter case interest is allowed only as damages for the detention of the money. We are, however, of opinion that the stipulation for interest does not change the principle which suspends its running during war" (Italics ours).

That debts are suspended during war, appears also in the quotation from *The Rapid* (*supra*), given in the third point of his brief, subdivision B.

The same result has been reached in England.

In *Du Belloix v. Lord Waterpark*, 24 Rev. Rep. (Great Britain), 628, S. C. 1 Dowl. & Ry. 16-20, decided by the King's Bench in 1822, a jury failed to give interest on a note due to a Frenchman who had been an alien enemy most of the period since the note had been made.

Abbott, Ch.J., said (p. 630):

"But there is another objection to the plaintiff's recovering interest on the debt, for during the greatest part of that time he was an alien enemy, and could not have recovered even the principal in this country, and at all events, during that portion of the time the interest could not have run, and it would even have been illegal to pay the bill whilst the plaintiff was an alien enemy."

Bayley, J., and Holroyd, J., concurred.

It is impossible to distinguish between principal and interest, as the above quotations show. Interest is not allowed during war for the sole reason that while war lasts there is no obligation *to pay the principal*.

In *Rederei Actien Gesellschaft Oceana v. Clutha Shipping Company, Limited*, *supra*, Judge Rose said (p. 342):

"The law is well settled that such a debt is not discharged by the war. *Janson v. Dreifontein Consolidated Mines, Ltd.*, *supra*.

"In proceedings of an equitable nature the courts will try to insure that when peace is restored due payment shall be made. *Ex parte Boussmaker*, 13 Vesey, 71. Nevertheless, the alien enemy cannot compel payment during hostilities, nor can the debtor lawfully pay him. This has long been the recognized law of Germany, of England and of the United States—the countries of the residences of the parties and the country in whose courts the instant suit is pending."

Belligerent nations may confiscate whatever enemy property they see fit, but a neutral nation, such as the United States, will hardly be persuaded to appropriate Austrian property, under the guise of Court proceedings, and turn it over to pay the claim of an Englishman, which claim is not due by the laws of war and payment of which has been made a criminal offence.

That this court should not enforce during war an obligation which is suspended during war needs no argument.

SIXTH POINT.

Further discussion of libellant's brief.

A. *Libellant's Third Point.* Since an action on a draft would not be a subject of admiralty jurisdiction, the libellant claims that the acceptance of the drafts was conditional payment only. Libellant states that the condition in the conditional payment has been violated. Illegality of an act is a good excuse for its non-performance. It would seem, therefore that respondent is not in default. It is also clear that the British Authorities prevented the branch of the Austrian bank from paying.

Moreover, it appears from the stipulation (fol. 40) that only copies of the original drafts were annexed thereto, and that the originals have not been tendered back. It is well settled law that in a case like the present the drafts must be surrendered before suit can be brought on the original obligation.

Ramsay v. Allegre, 12 Wheat. 611.

That was an action *in personam* against the owner of a vessel, by one who had furnished supplies, and taken a note, which was not paid. The opinion is reported (p. 613):

“Marshall, C. J., delivered the opinion of the court: that, as it did not appear by the record that the note had been tendered to be given up, or actually surrendered, at the hearing in the court below, the decree would be affirmed, it not being necessary to consider the question of jurisdiction.”

B. *Libelant's Fourth Point.* The fourth point of libelant's brief contains the following statement (p. 42):

"The respondent argues that the effect of the drafts was to transfer the place of payment from Algiers to London. Even if this be so, which the libelant denies, it does not avail as a defense for the following reasons:"

The libelant then quotes Section 7 of the King's proclamation (p. 42):

"Nothing in this proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in our dominions, if such payments arise out of transactions entered into before the outbreak of war, or otherwise permitted (fol. 292)."

The brief continues (p. 42):

"Thus express permission was given to a person or a corporation in the position of the libelant to receive payment from an enemy, without being guilty of a prohibited transaction with him."

This is the main argument of the fourth point of the brief, but the fallacy is quite obvious. As has been stated already, belligerents have the right to confiscate any property of a belligerent debtor which can be found within the jurisdiction, and, while such confiscation is not ordinarily made, at the present day, it is customary to allow the exception above referred to in Section 7, so that such property may be taken by English debtors if they have a claim against a citizen of a belligerent country. This is well pointed out by Judge Veeder in the Court below (fol. 402) in a

passage which is referred to with approval in the article in the Central Law Journal cited above (p. 217):

"It is quite beside the point to rely, as the libelant does, upon the fact that the libelant could enforce this payment in England (its home), if it could find the respondent or any of its property there. That recourse would be available to it under such circumstances as a particular application of the general rule looking to the impairment of the resources of the alien enemy. But it is because the libelant finds it impossible to reach the respondent or its property in England that it has applied to this forum. From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries forbids a payment by one belligerent subject to his enemy during the continuance of war. This court, in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it."

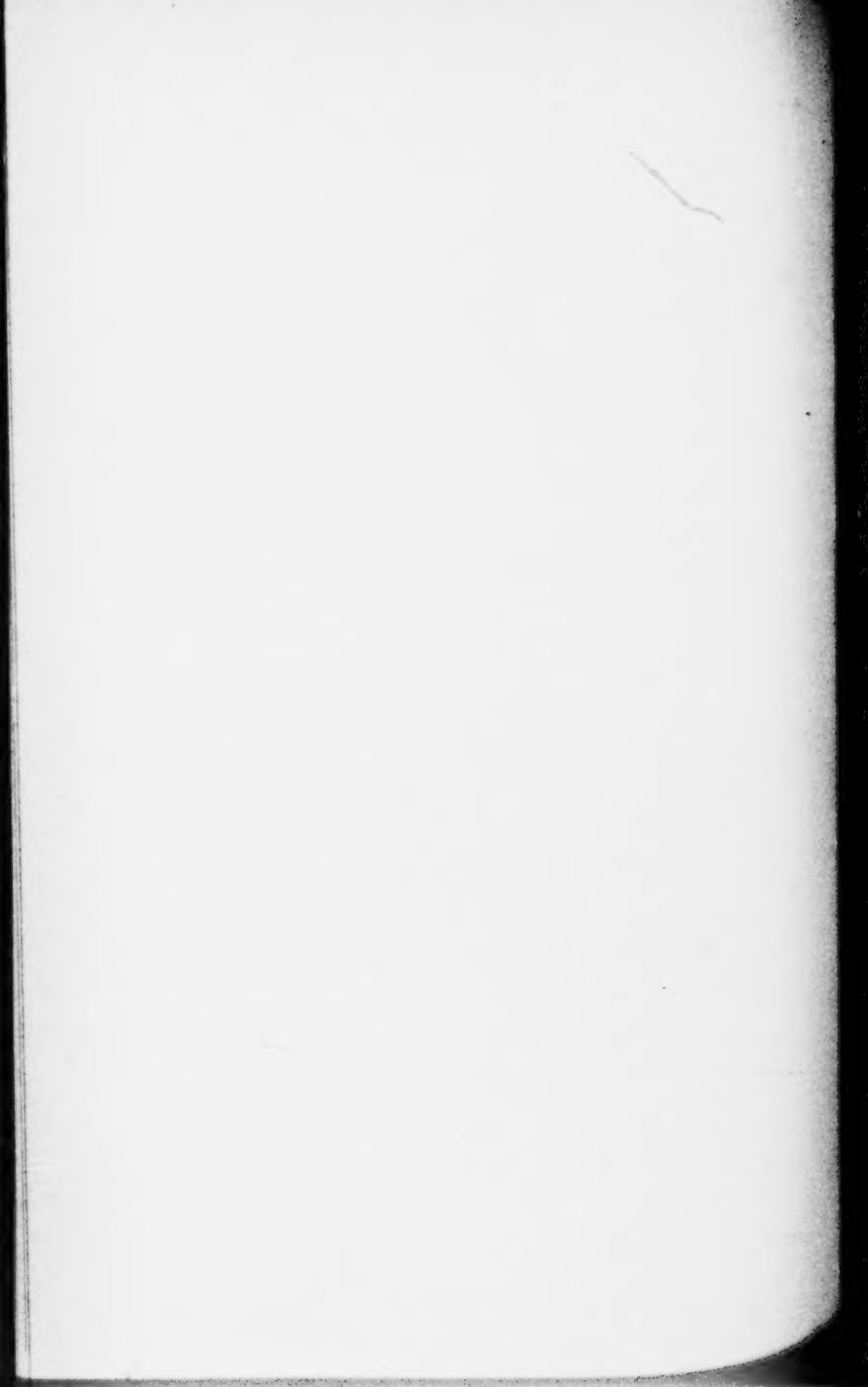
SEVENTH POINT.

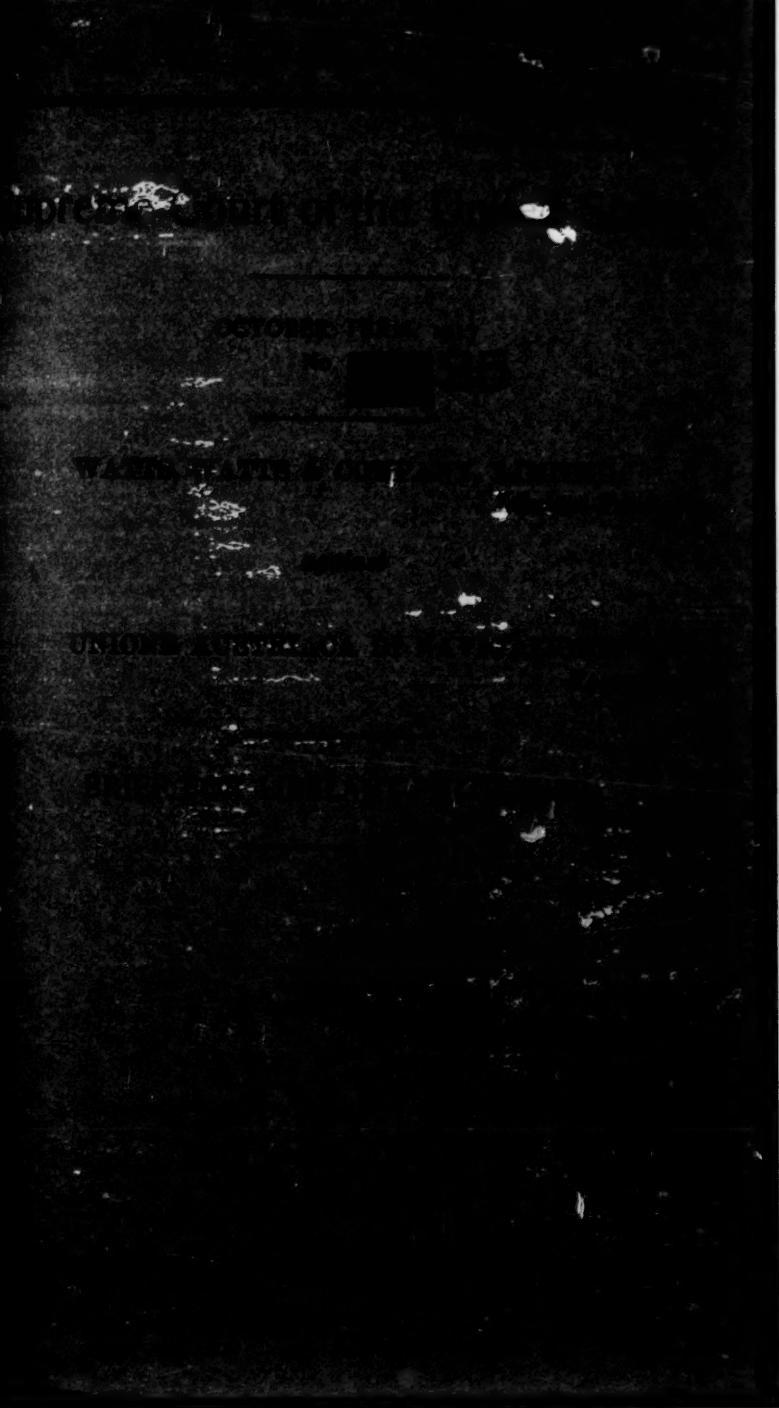
The application for writ of certiorari, and for leave to file a petition for a writ of mandamus, should be denied.

New York, June first, 1916.

Respectfully submitted,

CHARLES S. HAIGHT,
Counsel for Respondent.





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SUPREME COURT OF THE UNITED STATES.

WATTS, WATTS & COMPANY, LIMITED,
Libelant-Petitioner,

against

UNIONE AUSTRIACA DI NAVIGAZIONE,
Respondent.

October Term,
1917.
No. 180.

BRIEF FOR LIBELANT-PETITIONER.

STATEMENT OF THE CASE.

This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, by Watts, Watts & Company, Ltd.

The writ seeks to review a decree of the United States Circuit Court of Appeals for the Second Circuit made on the 24th day of December, 1915, which affirmed the decree of Judge Veeder in the District Court of the United States for the Eastern District of New York on May 27, 1915, whereby it was adjudged that the libel should be dismissed without prejudice. Fols. 405-408.

The opinion of Judge Veeder is reported in 224 Fed. 188, and the *per curiam* decision of the Circuit Court of Appeals affirming the decree is reported in 229 Fed. 136.

The libel in this suit was brought by Watts, Watts & Company, Ltd., an English corporation, with its principal offices in London, against the Unione Austriaca di Navigazione gia Austro-Americana e Fratelli Cosulich-Societa Anonima, an Austrian corporation, with its principal offices at Trieste, to recover the sum of \$45,360, the agreed and reasonable price of bunker coals furnished by the libelant to the respondent's steamers at Algiers, before the outbreak of war between England and Austria.

Prior to the war the respondent owned and operated a large fleet of steamers, some in the Mediterranean trades, and some in the Transatlantic trade between Trieste and the United States. In fact seven of the fourteen drafts state specifically that they are given for coal and supplies to enable the steamer in question to proceed to New York. Fols. 86, 93, 122, 130, 158, 166, 170, 178, 182, 190, 206, 214, 242, 250. Six of the drafts are to enable the same steamers to proceed on their east-erly voyages to Trieste from the United States. Fols. 98, 106, 134, 142, 146, 154, 194, 202, 218, 226, 230, 238.

Jurisdiction of the respondent shipowner here was obtained by writ of foreign attachment against the respondent's steamship *Martha Washington* while she was lying in New York Harbor. Since the writ of certiorari has been pending in this Court a bond of the National Surety Company has been given to discharge the attachment.

The respondent appeared generally by its proctor, and filed an answer to the libel admitting the allegation that the subject-matter of the libel was within the admiralty and maritime jurisdiction of the District Court. Fol. 23.

In the respondent's answer there is not anywhere any objection to the jurisdiction of the District Court.

There is not any issue of fact in this case. The indebtedness and the jurisdiction of the Court were admitted by the respondent, which placed its sole defense on an Austrian prohibition against trading with enemy subjects.

The following facts have been agreed upon:

On November 19, 1913, Watts, Watts & Company, Ltd., and Unione Austriaca di Navigazione entered into a contract, fols. 73-83, by the terms of which Watts, Watts & Company undertook to supply the bunker coal normally required by respondent's steamers coaling en route. The contract contained this stipulation as to the method of payment for the coals to be furnished:

“Payment to be in cash at port of delivery or by due acceptance and payment of Captain's Draft in sterling on owners at sixty days' sight payable in London; * * * ”

Pursuant to the contract coals were supplied by the libellant to the respondent's steamers at Algiers, a French possession. On the dates when the coals were furnished, the captains of the several steamers drew drafts in sterling on the owners at 60 days' sight, payable in London, for the price of the coal.

The following table itemizes the transactions:

Date	Vessel	No. of tons	Amount	Draft due
1914				
May 29	Martha Washington	606	£734.15.6	Aug. 7/14
June 1	Kaiser Franz Josef I	781	946.19.3	" 11/14
3	Anna	112	135.16.0	" 11/14
5	Oceania	572	620.16.0	" 17/14
9	Gerty	192	232.16.0	" 18/14
15	Argentina	290	351.12.6	" 22/14
18	Kaiser Franz Josef I	992	1202.16.0	" 27/14
23	Campania	140	169.15.0	Sept. 1/14
26	Belvedere	399	423. 3.3	" 4/14
28	Martha Washington		972. 8.6	" 4/14
July 3	Argentina	478	579.11.6	" 12/14
6	Oceania	463	561. 7.9	" 12/14
13	Kaiser Franz Josef I	803	973.12.9	" 22/14
23	Martha Washington	607	735.19.9	Oct. 1/14
			£8641. 9.9	

In addition to the above amount, £8641.9.9, there are some small items for the cost of protesting the drafts, which have been stipulated in by the parties, fols. 38-39, amounting in all to £8.2.6, making the libelant's total claim £8649.13.3, with interest on each item from the date when the coal was furnished.

The drafts were duly accepted by the respondent at Trieste as payable in London at Kais. Koen. Priv. Oesterreichische Laenderbank, a banking institution organized under the laws of Austria, which at the outbreak of the war had a duly established branch doing business in London. Fols. 36, 37, 42.

The libelant caused the drafts to be duly presented at the Laenderbank in London for payment, but none of the drafts was honored or paid, and all were duly protested for non-payment.

On August 4, 1914, Great Britain declared war against Germany and on the following day issued a proclamation prohibiting trading with the enemy. *Exhibit 17.*

The first draft fell due August 7th; the reason given for failure to pay was "Not sufficient cover." Fols. 93, 367.

On August 12th a state of war with Austria-Hungary was declared by Great Britain as from midnight of that day, and by proclamation issued on that day, the provisions of the previous proclamation of August 5th, prohibiting trading with the German Empire, were extended to all commercial intercourse with Austria-Hungary. *Exhibit 18.*

The second and third drafts became payable on August 11th. The notice of protest of these two drafts, dated August 13th, recites that the premises of the Laenderbank were found closed and the following notice posted:

"Owing to the state of war, the business of the London Branch of the Laenderbank is necessarily discontinued until its application to His Britannic Majesty's Government for a license to continue business has been granted." Fols. 102, 103, 114.

Both drafts were also endorsed by the Bank "Insufficient funds." Fols. 108, 120.

On or about August 13th, Sir William Plender was appointed Comptroller of the London branch of the Laenderbank. Fols. 42, 43. The reason given for failure to pay the next seven drafts falling due between August 17 and September 4th, as stated in the notice of protest, was

"We are instructed by Sir William Plender, the Comptroller appointed by the British Government, not to make any payments at present." Fol. 370.

The answer given on the presentation of the last four drafts was "No advice." Fol. 370.

It does not appear from the stipulated facts that the respondent had placed funds in the Laenderbank's London Branch to meet the drafts. The District Judge drawing allowable and necessary inferences from the facts and documents stipulated found that the drafts on the respondent payable at the Laenderbank, London, were not paid when due because the respondent had not forwarded the funds with which to pay them. Fol. 377. This is obvious from the notations on the first three drafts, fols. 93, 108, 120, which were the only drafts falling due before August 12 when war was declared between England and Austria. Fol. 40. After the war began, of course, money would not be transferred from Austria to England, for as the respondent itself states, they were prevented from fulfilling their obligations. Fol. 349. However, the notations on many of the drafts falling due after war began indicate that funds were not then available at London to meet the drafts. Fols. 108, 120, 211, 223, 235, 246.

The fact, however, that the drafts were not paid, whatever the reason therefor may have been, is admitted. This suit is not on the drafts but on the obligation to pay for goods sold and delivered. Hence the reason why the drafts were not paid is immaterial.

The situation from the point of view of the respondent was summarized in a letter of the respondent to Messrs. Watts, Watts & Company, dated Trieste, 19th September, 1914, from which we quote (fol. 348):

"We have accepted several drafts for Bunker Coal supplied to our ships, which, failing advice from our London Bankers, seem not to have been paid up to now. The whole amount of the drafts accepted with payment due up to September 29th, 1914, is:

"£ St. 8,641.9.9.

"Of course, it goes without saying, that we wish to confirm our liabilities for the payment of these amounts.

"The legal dispositions taken by the British and Austrian Governments (Moratoria) prevent us, however, to fulfill our original undertaking."

The situation, therefore, is that the libellant came into the District Court here with a claim in respect of which the respondent, in its sworn answer, has admitted the District Court's jurisdiction, and which the proofs show the respondent has admitted to be due.

Judge Veeder's finding in regard to the suggestion of the respondent's counsel, that the respondent was prevented by the authorities in England from making payment for the coals furnished appears in fols. 378-379:

"The embargo imposed by Sir William Plender, the Comptroller in charge of the Laenderbank, upon the payment of funds by the Bank, may be put aside. The respondent had not supplied the bank with funds.

“Moreover the libelant is not suing upon the drafts; when the libel was filed only six of the fourteen drafts had in fact become due. The libelant sues upon the original debt arising out of its performance of the contract.”

The libel was filed in the District Court of the United States for the Eastern District of New York on August 24, 1914, and on the following day process in personam with clause of foreign attachment against the respondent's steamship *Martha Washington* issued out of that court. The steamship lay under this attachment until August 2, 1917, when a bond of the National Surety Company, covering the amount of the claim, was given to free her from the attachment.

Judge Veeder stated in his opinion that he had taken jurisdiction of the case, fols. 385-403, but after a consideration of the respective war laws of Great Britain and Austria-Hungary, which prohibit intercourse with or payments to enemy subjects during the continuance of the state of war, held that the claim was not enforceable in our courts owing to the Austrian War law, though no such defense was pleaded in the answer. Judge Veeder summarizes the situation as he finds it, thus:

“From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries forbids a payment of one belligerent subject to his enemy during the continuance of war. This court, in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it.” Fol. 403.

Consequently the libel was ordered dismissed without prejudice and a decree entered accordingly.

The libelant appealed to the Circuit Court of Appeals for the Second Circuit, assigning as error that the District Court did not allow the claim, with interest, from the dates on which the coals were furnished to the several steamers, and, in fact, refused to hear and adjudicate the case on the merits, when it admittedly had jurisdiction to do so. Fols. 415, 416.

The Circuit Court of Appeals considered that Judge Veeder's decision, refusing to exercise the jurisdiction which he had previously assumed, was an exercise of judicial discretion, and affirmed the decree upon the ground that no abuse of discretion appeared. Fol. 430.

The Circuit Court of Appeals did not consider this case upon the merits and did not grant the libelant a new trial in that court, to which, under the familiar rule in admiralty causes, the appellant was entitled.

From the decree of the Circuit Court of Appeals, affirming the decision of Judge Veeder, the libelant was granted a writ of certiorari to this Court on June 16, 1916. Record, p. 111. 241 U. S., 677. A motion for a writ of mandamus to the Circuit Court of Appeals requiring it to decide the case was denied. 241 U. S., 655.

The substantial question which was involved in this cause in the Courts below was whether a neutral court in a suit between the subjects of belligerent countries, would enforce the retaliatory war measures of either belligerent. This was the situation when the writ of certiorari was granted by this court.

By the declaration of war between the United States and the Austro-Hungarian Empire on December 7, 1917, the situation has been wholly changed and *this Court is now asked to enforce an admitted claim in behalf of the subject of an allied nation against the subject of an enemy nation whose property has been attached and who has given a bond to answer any judgment of this Court herein.*

FIRST POINT.

THE LIBEL IN THIS CASE WAS FOR COAL SOLD AND DELIVERED BY THE ENGLISH LIBELANT TO THE AUSTRIAN RESPONDENT, WHICH APPEARED GENERALLY AND ADMITTED THE DEBT AND THE JURISDICTION OF THE COURT. CONSEQUENTLY THE COURTS BELOW ERRED IN NOT ALLOWING A RECOVERY TO THE LIBELANT.

a. *The obligation sued on is peculiarly of admiralty cognizance. It is a claim of common obligation, being in its essence a suit for goods sold and delivered.*

It is settled law throughout the civilized world that supplies furnished in foreign ports give rise to an action *in rem* against the particular vessel to which they are furnished and are the basis in courts of admiralty of a libel *in personam* against the owners of the vessels to which they are supplied.

There is no question in this case of the libellant's right to maintain an action *in personam*, or of the lia-

bility of the respondent for the coals furnished to this vessel. The respondent does not in fact dispute its liability for the full amount of libellant's claim. On the contrary, it recognizes the claim *in toto* by its letter of September 19, 1914, addressed to the libellant. *Exhibit 25*, fols. 347-349.

The law of Algiers is not involved in this case. That law would be material only if it were contended and assumed that the liability of the respondent was determined by the law of the place where the coal was furnished, and if some question as to the existence or the extent of the liability were raised.

As the liability is admitted here, there is not any ground for inquiry into the Algerian law, although there is no doubt that if jurisdiction had been obtained in the courts of Algiers, which is a French possession, the English libellant, as a subject of an ally of France, would have obtained judgment, because the courts of any country are open to subjects of its allies.

Thus it is seen that the suit involves simply one of the commonest bases of admiralty jurisdiction both *in rem* and *in personam*, in fact one of the commonest sources of liability between men—goods sold and delivered. Of common obligations of a simple nature like this Mr. Justice Holmes said in *Cuba Railroad Company v. Crosby*, 222 U. S. 473, at page 478:

“Such matters are likely to impose an obligation in all civilized countries.”

The cause of action is ambulatory in its nature and, at least in times of peace, would be enforceable in any maritime court throughout the world where jurisdiction according to the law of the forum by attachment or otherwise had been obtained of the defendant.

The fact that drafts were given for the supplies does not constitute a novation or waiver of the right of action against the vessel or its owner, unless it is expressly understood and agreed that the draft shall be considered as payment. *The Emily Souder* (1873) 17 Wall. 666, 670.

In the present case the contract expressly provided that the drafts had to be paid in order to operate as a discharge of the original obligation to pay for the coal furnished. It is an admitted fact that the drafts have not been paid and consequently the original claim for the coal sold and delivered, as set forth in the libel, remains in full force.

Libelant would have been entitled to maintain an action *in rem* against the *Martha Washington*, the vessel under attachment in this case, for the coal furnished on May 29, of the value of £734:15:6, on June 28 of the value of £972:8:6, and on July 23 of the value of £735:19:9. *Stipulation*, fols. 34-36.

The reason that these proceedings were brought *in personam* was that the *Martha Washington* was the only vessel within the jurisdiction to which coal had been furnished, and as there were so many vessels involved an action *in personam* seemed a simpler and more logical method of procedure than to sue the *Martha Washington*

in rem for the coal she herself had received and also to attach her in a separate proceeding, involving the coal furnished to the other vessels.

The obligation of the respondent could have been assigned by the libelant before the war to any person in the world, and since then to the subject of any nation not at war with England. If it had been assigned to the subject of any neutral power, no question could have been raised as to its enforcement in this country in this or any other proper form of action.

In the case of *The Anna Catharina*, 4 C. Rob. 107, 112-13, where, at the outbreak of war between England and Spain, a British subject had a contract under which he was to trade with the Spanish Government and transferred the same to a neutral, Sir William Scott recognized the contract as legal in the English courts, notwithstanding its illegality if it had remained in the hands of a British subject.

The Circuit Court of Appeals for the 2nd Circuit in its opinion, fol. 429, summed up the situation so far as the justice of the libelant's claim is concerned in these words:

“The respondent does not deny its obligation to pay.”

b. *The respondent appeared generally and admitted in its answer that the Court had jurisdiction and did not plead the special defence now relied on.*

The libel alleged that the matters set forth were within the jurisdiction of the District Court. Fol. 10.

This was admitted by the respondent who appeared generally. Article fifth of its answer, fol. 23, is as follows:

“Respondent admits that all and singular the premises of this libel are within the admiralty and maritime jurisdiction of this Honorable Court.”

The objection raised on the trial to the Court's enforcing the claim was that the respondent, as an Austrian subject was forbidden by the law of its own country from trading with the libelant, which is a British subject, and, therefore, because of that fact, and of an alleged Austrian moratorium, it should not be called on in a neutral court to make payment.

It is to be observed that this objection does not go to the subject matter of this suit and is at most, an objection of which the respondent alone and not the Court could have availed itself. Being an objection which obviously was personal to the respondent it should have been pleaded. It was not pleaded.

Under well settled principles the respondent having entered a general appearance and pleaded to the merits, the objection to the Court's taking jurisdiction of the respondent's person was waived. *N. Y. & Oriental SS. Co. v. U. S.*, 202 Fed. 311; *Thomassen v. Whitwell*, 9 Ben. 113; *Farrar & Brown v. U. S.*, 3 Pet. 458; *Ex Parte Schollenberger*, 96 U. S. 369, 378; *Southern Express Co. v. Todd*, C. C. A. 8th Circ., 56 Fed. 104; *Howland Pulp & Paper Co. v. Alfreds*, C. C. A. 1st Circ., 179 Fed. 482; *Betzoldt v. American Insurance Co.*, 47 Fed. 706.

In *Betzoldt v. American Insurance Co.*, 47 Fed. 706, the facts were that the plaintiff, an alien whose citizenship was not stated, sued the defendant, a Missouri corporation, in the Eastern District of Michigan, where the defendant entered a general appearance and pleaded to the merits. The defendant then sought to dispute the jurisdiction of the Court under the Act of Congress, of 1887, which provided that suit should not be brought against any person elsewhere than in the district "in which he is an inhabitant".

The Court held that the provision was a personal privilege of the defendant and had been waived by his general appearance.

In *N. Y. & Oriental SS. Co. v. U. S.*, 202 Fed. 311, C. C. A., 2d Cir., the Court held that a general appearance by a United States Attorney waived any personal defense that the United States might have with respect to the district in which the suit was brought.

The case at bar presents this singular situation:

The subject matter is communis juris, a common obligation and is peculiarly within the jurisdiction of the Admiralty Court, and the respondent has admitted the Court's jurisdiction over it, yet the Courts below of their own motion declined to exercise jurisdiction because of the fact that the respondent is a subject of the Emperor of Austria who is at war with the King of England, the sovereign of the libellant.

The District Court and the Circuit Court of Appeals have in effect allowed the respondent to come in and go

out of Court at its will, because although it appeared generally and admitted the jurisdiction of the Court in its answer and merely put the libelant to proof, both Courts have held that, acting within their discretion, under the circumstances they can refuse to adjudicate on the issues.

To allow a party to come in and go out of court at its will, even though that party is a government, has been a subject of adverse criticism by this Court in the case of the *People of Porto Rico vs. Ramos*, 232 U. S. 627, in which the question of an appearance of Porto Rico by its Attorney General was involved. In that case Mr. Justice McKenna said at page 632:

“Porto Rico, therefore, through its Attorney General, not only gave its consent to be a party to the cause, but invoked and obtained the ruling of the Court against the resistance of the plaintiff to make it party to the cause.

“The complaint having been amended as moved and directed and nearly a year having elapsed, there came a change of view, but the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step.”

Certainly, in the present case, as the respondent did not take timely exception to the jurisdiction, it cannot properly now be allowed to rid itself of the jurisdiction of the Court, nor could the Courts below properly escape from their duty of adjudicating the issues involved, of which their jurisdiction had been admitted by the respondent.

c. *The Courts below should have adjudicated the case in regular course.*

It is well settled that our admiralty courts take jurisdiction, in proceedings between foreigners either *in rem* or *in personam*, notwithstanding that the contract in suit was made and was to be performed, or the tort complained of committed, in a foreign country or on the high seas. The only requisite is that there should be jurisdiction of person or property. *The Maggie Hammond* (1869), 9 Wall. 435; *The Titanic*, 233 U. S. 718; *The Jerusalem* (1814), 2 Gall. 191; *Thomassen v. Whitwell* (1877), 9 Ben. 113; *Bernhard v. Creene* (1874), 3 Sawyer, 230; *Mason v. Blaireau* (1804), 2 Cranch, 240; *Cooper v. Newman* (1871), 14 Wall. 152; *The Napoleon* (1845), Olc. 208; *Davis v. Leslie* (1848), Abb. Adm. 123; *Bucker v. Klorkgeter* (1849), Abb. Adm. 402; *Fairgrieve v. Marine Ins. Co.* (1899), 94 Fed. 686; *The Attualita*, 238 Fed. 909, C. C. A. 6th Circ.

Although in some suits between foreigners our admiralty courts may have discretion to decline to take jurisdiction, this is not such a case. The discretion referred to is not absolute but has been strictly defined by this Court. *The Maggie Hammond*, 9 Wall. 435, 456, 457. *The Belgenland*, 114 U. S. 355.

In *The Maggie Hammond*, *supra*, the only situation indicated as justifying refusal to exercise jurisdiction is stated at page 457 as follows:

“The Court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.”

The parties to this case have no home forum. The libelant cannot secure jurisdiction in England nor can he, owing to the war, maintain the action in Austrian courts. If the Court here declines to take jurisdiction, the result will be a denial of all justice.

The principle of *The Maggie Hammond* was evidently in the mind of the District Judge in this case, although he did not follow it. He said at fols. 388, 389:

“Where the parties are not only foreigners, but belong to different nations and have therefore no common forum, good and sufficient reason should appear to warrant a refusal to entertain the action.”

In *The Belgenland*, *supra*, a collision took place on the high seas between vessels of different nationalities. This Court in holding that the admiralty courts of the United States should not decline to take jurisdiction stated quite clearly the circumstances which should exist in order to justify an admiralty court in declining to take jurisdiction. The circumstances mentioned are:

(1) That both vessels are subject to the laws of the same country and there is no difficulty in a resort to its courts,

(2) That the disputes are between seamen and master, and that in the absence of treaty the consul of the country does not assent to the jurisdiction; where the suit is for wrongful dismissal or acts of cruelty the consul's assent is unnecessary,

(3) When the suit involves matters affecting only parties on the vessel which must be determined by the law of the country to which the vessel belongs.

At pages 368, 369, Mr. Justice Bradley said:

“Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured or doing the service should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is pre-eminently one *communis juris*, and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of the nations to which the litigants belong. As Judge Deady very justly said in a case before him in the district of Oregon: ‘The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found.’ *Bernhard v. Grete*, 3 Sawyer, 230, 235.”

In the case at bar the libellant and respondent are not subject to the laws of the same country and it is impossible for the English libellant to resort to the Austrian courts.

This suit is clearly *communis juris* and is plainly outside of the exceptions enumerated by the Supreme Court in the case of *The Belgenland*, *supra*, and within the rule laid down in the quotation last made. Once the Supreme Court has specified the circumstances under which jurisdiction may be denied, as it has done in *The Maggie Hammond* and *The Belgenland*, the ques-

tion of discretion in the lower Federal Courts to decline jurisdiction under the circumstances specified can, it is submitted, hardly be considered open.

In addition to the fact that the present controversy is *communis juris*, and that the parties do not belong to the same foreign nation, it is the fact, as has been noted above at page 21, that most of the coal for the price of which the libellant is suing, was bought and used in carrying on trade between Trieste and New York. Thus the United States had an interest in the transaction as directly supporting its commerce. This point was made in *The Belgenland*, (*supra*). At page 366 of that case reference is made to the case of *The Jerusalem*, 2 Gall. 191, decided by Justice Story, where jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte. Although it did not appear that it was intended that the vessel should come to the United States, it is clearly to be inferred that if it did appear that the vessel was intended to come to the United States, there could not have been any question of the propriety of exercising jurisdiction.

The situation before the Court in the present litigation is, therefore, merely that of a claim on a contract executed in full on the part of a British subject by furnishing coal at Algiers, a French possession, to an Austrian subject before the outbreak of the war between England and Austria.

Judge Veeder's decision amounts to the enforcement by our courts of the Austrian war law contained in the

proclamations of the Emperor and his joint ministry "regarding measures of reprisals." *Stipulation*, Exhibits 21-24; fols. 320 to 347. It is in effect giving extraterritorial force to the Austrian law in our courts to make it a bar to the claim of a British subject who had secured jurisdiction according to our practice by attachment of an Austrian subject's property followed by general appearance.

Judge Veeder, fol. 403, summed up his reasons for declining to entertain jurisdiction as follows:

"From the stand-point of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries forbids a payment by one belligerent subject to his enemy during the continuance of war. This Court, in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it."

How does the war between England and Austria properly affect the action of a neutral Court in this case?

The obligation here sued on has nothing to do with war, and its enforcement will not aid England as against Austria.

The libelant is not seeking any favor as a belligerent from this Court, but only enforcement of its private right which the respondent does not dispute. This right the libelant contends should be equally enforced in favor of an Austrian subject suing an English subject or an Englishman suing an Austrian subject in all cases where in times of peace the right would be enforced. This is strict impartiality.

As to neutrality, the objection is the other way. If enforcement of the obligation is denied on the ground

that Austria by her war measures has prohibited the respondent from discharging its debt that cannot be said to be neutral. That would be directly to aid Austria in carrying out her purpose of destroying the property of and denying justice to all Englishmen.

The only safe course for a neutral court is to do justice as between the subjects of all the belligerent nations.

Strict neutrality requires that we disregard the war measures of all belligerents and apply our own laws, since neither party has any claim to have his own law applied.

It is not unneutral for our citizens to export munitions of war directly to belligerents. *Northern Pacific Ry. Co. v. American Trading Co.*, 195 U. S. 439. As this Court may notice, this question was much agitated before we ourselves declared war, the contention being that this country, though friendly to Germany, was aiding its enemies by not prohibiting the export of munitions of war. The position of our Government has made it clear that it is the right of our citizens to sell munitions of war to whoever will buy, and that to prohibit this commerce on the ground suggested would be a distinctly unneutral act.

If this commerce in the very articles of war with the enemies of Germany is not unneutral, how can it be said that the enforcement of simple contract obligations, having nothing to do with war, infringes our neutrality?

Indeed Judge Veeder seems to recognize this for in his opinion, fol. 384, he said:

“So far as neutrality is concerned, how can it be a breach of neutrality for this court to decide

controversies in accordance with the settled principles of maritime law, when regularly presented to it in accordance with recognized admiralty procedure? How can such enforcement here of legal rights between all belligerent subjects, irrespective of their enemy status abroad, be said to infringe that attitude of impartiality which lies at the foundation of neutrality?"

The District Judge, therefore, clearly did not base his decision on any question of neutrality, and differed in regard to the neutrality question from the contentions made on behalf of the respondent.

d. *The courts below dealt with the simple situation which existed in this case in a novel and erroneous manner.*

This was not a case where there was a dispute on the facts on which evidence had to be secured from a foreign country in the throes of war.

The facts were all stipulated, the amount of the debt admitted, the jurisdiction of the court admitted, and yet the District Court, having found the facts in favor of the libelant and after taking jurisdiction of the case, held that "in the exercise of jurisdiction founded on comity" (fol. 403), the Austrian war law had to be applied at the expense of the English libelant.

Judge Veeder's decision was not based on any rule of convenience or on any ground of public policy. As above noted, it was not based on any theory of neutrality.

A most singular result followed from the appeal to the Circuit Court of Appeals. That court had held in the case of the *Munson Steamship Line vs. Miramar Steamship Company, Ltd.*, (1909), 167 Fed. 960, 964, C. C. A. 2d Circ., that an appeal in admiralty constituted a trial *de novo*; yet in the present case they refused to exercise the judicial function and rested their decision on a wrong reading of Judge Veeder's opinion and stated (fol. 430):

"Judge Veeder in the District Court, feeling that it was inexpedient under the circumstances to take jurisdiction of the controversy, dismissed the libel without prejudice. Whether to take or decline jurisdiction was a matter within his discretion (see *The Belgenland*, 114 U. S. 355; Benedict on Admiralty, §195), and as no abuse of discretion appears, the decree is affirmed."

This decision was not only erroneous on the merits but was erroneous as a matter of practice for the reason that on a trial *de novo* the Court of Appeals should have exercised the judicial function in respect of the case itself.

The libellant applied unsuccessfully to this court for a mandamus to the Circuit Court of Appeals requiring it to decide the case, 241 U. S. 655, at the same time when the successful application for this certiorari was made, 241 U. S. 677.

So as the matter now comes before this court, the District Court alone has exercised the judicial function on this case and that court has refused to enforce the libellant's admitted claim on the plea that the jurisdic-

tion is founded on comity, and that therefore the Austrian war law must be sustained as a defense to the present claim.

e. *The failure of the courts to adjudicate this case is not comity, but a breach of comity.*

It can hardly be comity to enforce an Austrian war measure prescribing that payment shall not be made, and decline to enforce a right of common obligation inhering in the subject of England. The Austrian proclamation prohibiting payments to England does not deny the existence of the right, but merely purports to postpone its enforcement.

The question is merely one of maintaining suits in our courts, with respect to which neither the laws of Great Britain nor Austria nor France can confer or deny any right. The libelant does not seek to enforce a law of Great Britain, but a private right *communis juris*.

In enforcing this right this Court is not giving efficacy to the laws of one of the belligerents as against those of the other, but is merely passing on the sufficiency, as a defense in our courts, of the Austrian war measure. In refusing to enforce the libelant's claim, the courts below gave efficacy to the law of Austria, which was not even pleaded as a defense.

The only objection to the enforcement of the obligation is that it is held by a British subject. If Austrians, Turks, Swedes, Norwegians, Danes, Greeks or Spaniards held similar claims against the respondent they could proceed here without objection.

The defense is in reality a plea of alien enemy, which so long ago as 1799 was said by Lord Kenyon in *Casseres v. Bell*, 8 Term Reports, 166, to be "an odious plea".

Raised in the courts of a neutral nation, such a plea was absurd and should have been as unsuccessful as it is odious.

Notwithstanding that when the case was tried we knew no alien enemies, this Court is called upon by this defense to discriminate in favor of the Austrian Government against Englishmen. Since the obligation itself is not affected by the prohibition it seems clear enough that the prohibition,—considered for the moment from the point of view most favorable to the claimant—goes only to the party who shall sue.

An alien enemy has no right to sue in the courts of a King with whom his own Sovereign is at war, because a personal disability of suing under such circumstances attaches to an alien. *Daimler Company, Ltd., v. Continental Tyre and Rubber Co., Ltd.*, [1916] 2 A. C. 307, at page 316, per the Earl of Halsbury. There is not any such disability in an alien friend.

It is elementary, however, that the matter of parties is to be governed by the law of the forum, and, as we have previously pointed out, a question of personal jurisdiction of a defendant may be waived, and if in this case there was such a question it was waived by general appearance and pleading to the merits.

Although the Austrian proclamation has some of the features of a moratorium, it is for the purposes of this defense only a penal law.

A civil moratorium will be recognized in a foreign court as the law in force at the place of payment provided it is not inconsistent with the public policy of the forum, and is otherwise enforceable. *Rouquette v. Overman*, L. R., 10 Q. B. 525. But there was no local moratorium prohibiting payment in England where payment in this case should have been made nor in Algiers where it might have been made.

No rule of law which has hitherto been recognized can be invoked to call for the enforcement *in this country* of the Austrian prohibition as a moratorium. It must stand or fall in its character as a prohibition. In this guise it was not intended to relieve Austrian subjects from the immediate pressure of debts, as is the case of ordinary moratorium decrees, nor is it intended to benefit them at all. It was promulgated for the avowed purpose of injuring British merchants' commerce and property in connection with war, and is highly penal. This country has no interest in destroying British property or commerce or injuring British merchants and, indeed, had to be circumspect not to aid others in that purpose.

It is immaterial that Great Britain has enacted similar prohibitions although not nearly so stringent. Austria does not acknowledge the force of these prohibitions any more than Great Britain acknowledges the force of German or Austrian proclamations. *Robinson v. Continental Ins. Co. of Mannheim* [1915], 1 K. B. 155.

It therefore cannot be said that the parties acknowledge the same law as the District Judge seems to intimate. Fol. 403.

For this country even when neutral to deny enforcement of an admitted obligation on the ground that some other country has prohibited enforcement of such an obligation in its courts is merely to declare to the libellant that he shall not have relief because his enemy has decreed otherwise.

It is settled beyond all controversy not only that the matter of parties is governed by the law of the forum, but that the courts of one country will not enforce or recognize the penal laws of another. It is generally said to be contrary to public policy to enforce foreign penal laws. *Huntington v. Attrill*, 146 U. S. 657; Minor, on Conflict of Laws, Sect. 10 and notes.

On the strength of these fundamental principles it would seem that the defense of the Austrian proclamation must be held insufficient in this case.

But Judge Veeder in effect said that *comity* requires that this Court give effect to the defense.

In *Hilton v. Guyot*, 159 U. S. 113, 164, *comity* is defined by this Court to be

“The recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation * * *.”

Each sovereign state is supreme within its own limits, and it is always within its power at any time

to exclude any or all foreign laws from operation within its borders.

Law is *prima facie* territorial. The effect of the Austrian proclamation is limited to the boundaries of the Austrian Empire unless other nations choose for the time being to abdicate their municipal law and set up the law of the Austrian proclamation in its stead.

Comity in its true sense, however, is *limited to enforcing substantive rights*. Thus, in Wharton's Conflict of Laws, Sect. 428 A, Vol. 2, pages 938-9 (3d Ed. 1905), it is said:

"Not only will the courts entertain an action on a foreign contract, but they will generally, as a matter of comity, determine and enforce the substantive rights and obligations under the contract in accordance with the proper law of the contract, ascertained by the application of what are deemed at the forum to be the true principles of international law upon the subject * * *."

Rorer on *Interstate Law* says, at page 7:

"In a case cited in the note [*Railway v. McCormick*, 71 Tex. 660, 667], the ruling is unambiguous and express that comity extends only to enforce obligations, contracts and rights under provisions of law of other countries which are analogous or similar to those of the state where the litigation arises."

Comity is thus seen to be a matter of the *enforcement* of a substantive right accruing under some foreign law which is analogous to the law existing in the state where the litigation arises. Effect is given by our courts to a

substantive right created by foreign law, although our own municipal law might not have affixed the same legal consequences if the transaction had occurred within our jurisdiction. *Clark v. Russell*, 97 Fed. Rep. 900; *Evey v. Mexican Central Ry. Co., Ltd.*, 81 Fed. Rep. 294; *Melan v. The Duke of Fitzjames* (1797) 1 Bos. & Pul. 138; *Morrisette v. Canadian Pacific Railway Co.*, 76 Vt. 267; *Walsh v. New York & N. E. R. R. Co.*, 160 Mass. 571, Holmes, J.; *Higgins v. Central New England &c. R. R. Co.*, 155 Mass. 176; *Dennick v. Central R. R. Co. of N. J.*, 103 U. S. 11; *Royal Arcanum v. Green*, 237 U. S. 531; *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48.

The Austrian proclamation clearly does not fall within this rule.

In the first place, it does not purport to give any right, substantive or otherwise. It is merely a prohibition, which came into being after the original obligation in favor of the libellant was complete, due to the fact that the coal had been furnished to the respondent's vessels before the war began. It is a procedural limitation, closing the courts of Austria to British subjects.

In the second place, there was, when the case was tried, nothing analogous to the proclamation in our own law.

And finally, if there were, we conceive that its penal character would prevent the enforcement by analogy of any right arising under it.

The respondent, in effect, asks that we displace our municipal law, which allows the enforcement of all

ordinary substantive obligations, even though arising abroad, and set up in its place this Austrian prohibition which declares that an obligation, created by a law which the respondent recognized when the obligation arose, shall not be enforced for the time being.

The very statement of the proposition, once its elements are appreciated, is enough to condemn it. Yet effect cannot be given to the defense asserted by the respondent unless this Austrian war measure is enforced as a part of the municipal law of this country. To do this would not be in any sense an exercise of comity.

It would be to deny comity to the only substantive obligation in the suit, namely, the libellant's admitted claim, and to take sides with the belligerent which says that that obligation shall not be paid for the time being.

It would be in substance to take an unneutral position as between belligerents.

The reasons stated by the District Judge for his decision have been strongly disapproved, and a solid ground for the application of the opposite rule has been enunciated by Vice Chancellor Stevens of the Chancery Court of New Jersey in the case of *Compagnie Universelle de Telegraphie et de Telephonie Sans Fil v. United States Service Corporation, et al.*, 84 N. J. Eq., 604, decided since Judge Veeder announced his opinion in this case.

The New Jersey case was brought to enforce a contract to convey land at Tuckerton, New Jersey, on which a radio-telegraph station had been erected. The contract was entered into at Paris between French and

German subjects. The German subjects, defendants in the action, pleaded to the jurisdiction of the Court, basing their plea on the ground that the Court ought not now to entertain the suit because it would be unlawful according to the laws of their respective countries for the subjects or citizens of Germany or France to perform a decree if made. After quoting with approval Judge Veeder's summary in the case at bar of the law applicable as between nations at war, Vice Chancellor Stevens says, 84 N. J. Eq. at p. 609:

“From the opinion of Judge Veeder it is apparent that in the case of executed contracts—that is, contracts, like the one under consideration, performed on one side—suspension of the remedy, even in a belligerent court, is not absolute. Such contracts will be enforced where it is to the advantage of the belligerent to enforce them. But this is by no means all. It was held *In re Boussmaker*, 13 Vesey, 71, that in cases of bankruptcy, an alien enemy's claim against the bankrupt can be proved, but that the dividend will be reserved until the close of the war. In *McVeigh v. United States*, 11 Wall. 267, it was held that an alien enemy can defend a suit brought against him. As far back as the time of William III it was decided that if an alien enemy came into the kingdom, *sub salvo conductu*, he might maintain an action; for, said the Court, ‘suing is but a consequential right of protection and therefore an alien enemy that is here in peace, under protection, may sue a bond.’ Trotter in his work on ‘Contract During War,’ page 951, says: ‘The general rule is that an action cannot, during war, be brought by or on behalf of an

alien enemy unless by virtue of a statute, or by an order in council, or a proclamation, or a license from the crown, or unless he comes into the British dominions under a flag of truce, a cartel, a pass or some other public authority that puts him in the King's peace *pro hac vice*. In *Casseres v. Bell*, 8 T. R. 166, Lord Kenyon said that the plea of alien enemy was an odious one, and in *Kershaw v. Kelsey*, 100 Mass. 561, where it was held that payment to the agent of an alien enemy was good, Mr. Justice Gray said: 'At this age of the world when all tendencies of the law of Nations are to exempt individuals and private contracts from injury or restraints in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.'

"These citations demonstrate that even in the view of the belligerents themselves, contracts entered into before the beginning of hostilities continue in force during the war; that they may be sued upon, if to the disadvantage of the alien enemy defendant; that the alien enemy may always defend and that he may, in exceptional cases, sue. Is it possible that the courts of a neutral would refuse jurisdiction where enemy courts would entertain it? It is said in the opinion of Judge Veeder (*supra*) that there is no authority bearing upon the question of the standing of belligerents in the court of a neutral where those belligerents are forbidden by the laws of their respective countries to have dealings with each other. This may have arisen from the fact that no suit by the subject of one belligerent nation domiciled abroad has ever been brought against the subject of another in

the court of a neutral—a supposition somewhat improbable—or from the fact that the question has not been raised, because it has been the professional opinion that inasmuch as the laws of foreign countries, have no extraterritorial force, the courts of neutrals are as completely open to suitors whose governments are at war with each other as to other litigants. If the only ground upon which the courts of a belligerent are shut against its alien enemy, is possible advantage that might accrue to him, this ground fails entirely when the courts of a neutral are appealed to. The neutral nation is the friend of both belligerents and comity requires that the doors of its courts be open, if their subjects have wrongs to be righted. On what ground then are they, in the case at hand, to be closed? Certainly not on the plea of alien enemy.”

Then, after discussing the French and German war law and finding that each seemed severally to codify the law of war substantially as stated in Judge Veeder’s opinion, Vice Chancellor Stevens proceeds, as follows, page 614:

“Judge Veeder dismissed the suit brought by Watts & Co. He seems to have treated it as one in which exercise of jurisdiction was discretionary, the parties, the contract and the attached vessel being all foreign. He seems to have thought that the pendency of the war and the laws and ordinances promulgated by the belligerents were good reasons for declining jurisdiction. Whether they were or not—and they do not seem to be very obviously so—the case is no authority for the proposition that this Court

should refuse to entertain a question of title to land in New Jersey. * * *

“To sum up. In times of peace, the Courts take jurisdiction, as a matter of course, for the benefit of denizens and aliens alike. If foreign nations are at war among themselves, this nation does not cease to be friendly. Its courts remain open to their subjects. Certainly a French citizen may still sue an American citizen. Why should he not sue a German subject? No law of France prohibits it. On the contrary, he may sue even in France, if to his advantage and not to the advantage of his enemy. Why may he not sue in this Court? If he may not, it can only be on the ground that this Court will give *some* effect to German legislation enacted as a war measure—as a means of crippling its enemy. As I have already shown, there is nothing in this legislation, disclosed at least by the plea, that prohibits the German subject from defending against a French claim. But suppose there were. If this Court gave effect to it, it would, in a measure, be enforcing German law, which on well settled principles can have no extra-territorial operation, to the detriment of the French citizen asking to be heard. This it seems to me would be an unneutral act. I therefore think that the plea should be overruled and that the defendants who have not disclaimed, should answer.”

With all due respect, Vice Chancellor Stevens stated a distinction between his case and Judge Veeder's which does not exist. For Vice Chancellor Stevens' case was purely a case for specific performance which could have been maintained wherever the defendant

could have been reached with process. It was not in any sense a real action, such as an action of ejectment.

In the celebrated case of *Penn v. Lord Baltimore*, 1 Ves. 444, Lord Hardwicke, the Chancellor of England, decreed in the English courts a specific performance of a contract respecting lands lying in North America.

In *Massie v. Watts*, 6 Cranch 148, this Court held that a suit in equity to compel the conveyance of lands lying beyond the jurisdiction of the Court was not a local action, but could be maintained wherever the court had jurisdiction of the person of the defendant, even though a question of title may constitute the essential point on which the case depends.

In *Ward v. Arredondo*, Hopkins' Ch. Rep. 223, 14 Am. Dec. 543, the Court of Chancery of the State of New York maintained a bill for the specific performance of a contract to sell land situate in Florida against a non-resident alien, holding that the complainant's cause of action was transitory and might be enforced in any country.

So the distinction made by the Vice Chancellor is not substantial and his opinion must be deemed to be directly at issue with Judge Veeder's.

The decision of Vice Chancellor Stevens has been affirmed by the Court of Errors and Appeals of New Jersey on his opinion. 85 N. J. Eq. 601.

Vice Chancellor Stevens has, it is submitted, correctly stated the law applicable to the present case when we were still neutral and it is very clear that if it had been before him the libelant would have had a decree.

In a clear case of admitted liability, it is submitted that the enforcement of the Austrian law at the expense

of the British libelants was an unneutral act by a neutral Court. The libelant should have had a decree for the full amount of its claim with interest in respect of coal furnished to each vessel from the date on which it was furnished at the usual rate of six per cent.

SECOND POINT.

THE GROUNDS OF DEFENCE WHICH HAVE BEEN PUT FORWARD BY THE RESPONDENT ARE WITHOUT MERIT.

The respondent's contentions will now be considered:

a. *The respondent's contention that the theoretical right of Austria to confiscate debts owed to enemy subjects was a ground for not enforcing the libelant's claim is without merit.*

The curious contention which was put forward in the Circuit Court of Appeals in behalf of the respondent that "a decree ordering payment would be an infringement of Austria's rights to confiscate" is wholly without merit. It appears to have been merely a gesture.

In urging this contention the respondent employed the simile of bales of cotton lying on the dock at Trieste, and did not seem to realize the difference between an action *in rem* against the bales of cotton by which those bales might be subject to confiscation by some appropriate proceeding in the Austrian courts, and an attempt at a confiscation of a *chose in action*

which at most could not be anything but the creation of a prohibition against the English plaintiff's suing in Austrian courts, and which would not be recognized in any other courts except the courts of an ally of Austria. Mr. Justice Holmes said, in *McDonald vs. Mabee*, 243 U. S. 90, that "the foundation of physical jurisdiction is physical power."

The supposititious cotton which was the basis of the argument of the respondent on the confiscation theory in the Circuit Court of Appeals would have been tangible and subject to the power of Austria; the debt owed by an Austrian to an Englishman is intangible.

The cotton would have been a *res*; the debt is a relation.

Even if Austria should attempt to confiscate the debt, this action would merely confer upon the debtor a personal defense in the Austrian courts, and would not prevent recovery upon the debt in a court of another country where the creditor could get jurisdiction of his debtor, since any attempted confiscation of the debt without jurisdiction being secured of the English creditor would be *ex parte*.

An Austrian decree of confiscation could not have any extra-territorial effect.

Baglin v. Cusenier Co., 221 U. S. 580, is a case in point. In that case an official French liquidator had been appointed of the Carthusian monastery and the other property of the Carthusian monks in France. The monks thereupon removed to Spain, taking with them the secret of the manufacture of the liqueur Chartreuse. In this Court the assignee of the French liquidator claimed that

the effect of the legal proceedings which had been taken in France was to vest in him title to the trademarks in the United States and the right to vend his product under that name. Mr. Justice Hughes, disposing of this contention, said at p. 596:

“The French law cannot be conceived to have any extra territorial effect to detach the trademarks in this country from the product of the monks which they are still manufacturing.”

In Hall on International Law, 4th Edition, at p. 459, the learned author, after pointing out that since the end of the Napoleonic Wars the only instance of confiscation which has occurred was supplied by the American Civil War in which the Congress of the Confederate States by an Act passed in August, 1861, enacted that “property of whatever nature except possibly stocks and securities held by an alien enemy since the 21st of May, 1861, shall be sequestrated and appropriated”, said at pp. 458, 459:

“It is evident that although it is within the bare rights of a belligerent to appropriate the property of his enemies existing within his jurisdiction, it can very rarely be wise to do so. Besides exposing his subjects to like measures on the part of his adversary, his action may cause them to be obliged to pay debts twice over. The fact of payment to him is, of course, no answer to a suit in the courts of the creditor’s state; and property belonging to the debtor coming into the jurisdiction of the latter at a subsequent time might be seized in satisfaction of the creditor’s claim.”

The fact that a decree of confiscation is not respected beyond the jurisdiction of the court where it was entered

and that the creditor who was not a party to the confiscation proceedings may enforce his debt elsewhere regardless of that decree, indicates conclusively that the decree is not *res adjudicata* and is entitled to no respect in the courts of another jurisdiction for the simple reason that the court had no jurisdiction of the creditor and its decree could not operate to extinguish the debt.

The attitude of the courts on the confiscation of belligerents' property and the strictness with which such proceedings are scrutinized in order to see whether actual jurisdiction was obtained, are illustrated by the cases of *Day vs. Micou*, 18 Wall. 156; *Phoenix Bank v. Risley*, 111 U. S. 125, 130; *Conrad v. Waples*, 96 U. S. 279; *Chapman vs. Phoenix National Bank*, 85 N. Y. 437 449, 451; *Williams v. Bruffy*, 96 U. S. 176; *Avegno v. Schmidt & Ziegler*, 35 La. Ann. 585; *Ware v. Hilton*, 3 Dallas 199; *Brown v. United States*, 8 Cranch, 110; *United States v. Percheman*, 7 Pet. 51.

In *Williams v. Bruffy*, 96 U. S. 176, in an action of assumpsit, the defendant pleaded the confiscation by sequestration under a decree by a Confederate district court in Virginia in pursuance of a statute of the Confederacy. This Court held that payment of the debt under the confiscation proceeding was not a defense and said, at p. 187:

“The debts not being tangible things subject to physical seizure and removal, the debtors cannot claim release from liability to their creditors by reason of coerced payment of equivalent sums to an unlawful combination. The debts can only

be satisfied when paid to the creditors to whom they are due, or to others by direction of lawful authority."

Furthermore, there is no proof whatever that Austria has taken any such barbaric step as to confiscate debts owed by her subjects to enemy subjects.

In order to constitute a defense based on confiscation, the respondent would have to prove that a valid decree of confiscation by a court having jurisdiction of the parties had been rendered. Certainly this Court would not suspend its process or decree in order to give Austria an opportunity of exercising any such alleged right, especially in view of the present international situation.

b. If, as the respondent claims, the giving of the drafts made the place of payment under the contract London instead of Algiers, payment would have been legal and enforceable there, and consequently there is no ground, on the respondent's own theory, for refusing a recovery in the present case.

The point taken by counsel for the respondent in the lower courts that the drafts constituted payment, and that there has been a novation by acceptance of the drafts is refuted by the terms of the contract itself, which provides not only for acceptance but *payment* of drafts as a means of payment under the contract. The drafts were not substituted obligations, but were merely a means of paying in London instead of paying in cash in Algiers when the coal was furnished.

If as the respondent argues the effect of the giving of the drafts was to transfer the place of payment from Algiers to London, which the libelant denies, it does not avail as a defense for the following reasons:

1. Under the law of England, as set forth in the King's Proclamation, known as "Trading with the Enemy Proclamation No. 2", issued on September 9, 1914, and annexed to the stipulation of Facts as Exhibit 19, fols. 277-294, it was provided in Section 7 as follows:

"Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in Our Dominions, if such payments arise out of transactions entered into before the outbreak of War or otherwise permitted." Fol. 292.

Thus express permission was given to a person or a corporation in the position of the libelant to receive payment from an enemy, without being guilty of a prohibited transaction with him. This is clearly pointed out by Lord Strathelyde in the case of *Oronstein & Koppel v. Egyptian Phosphate Co., Ltd.*, 1914, 2 Scotch L. T. 293, decided in the Court of Sessions of Scotland, 1st Division, November 6, 1914, and reported in *Trotter's Law of Contract During War*, 428. This was one of the cases offered at the trial under the stipulation as to proof of foreign law.

The same right is recognized by Mr. Justice Bailhache in *Ingle v. Mannheim Ins. Co.*, October 19th and 29th, 1914, 31 T. L. R. 41, (1915), 1 K. B. 227, a case which was also offered in evidence at the time of the trial. Fol. 355.

Mr. Justice Bailhache says:

"I agree with the plaintiffs that the proclamation is not retrospective. Even if this proclamation is to be treated as affecting the position, I am not prepared to hold that payment of a loss by a German Insurance Company, or an action against such insurance company to recover a loss, is a transaction within the meaning of the proclamation. So to hold would be to deprive a British subject of the right to receive money or to sue an alien enemy, which in my opinion he at law has, at any rate, when the right to be paid or to sue has accrued before the defendant has acquired the status of an alien enemy, and I should require to find clear words in a proclamation to induce me to decide that an executive has given the alien enemy relief to which he is not otherwise entitled.

"Paragraph 7 of the Proclamation of September 9, which has not been repealed, seems to me in accordance with this view. I think that this clause is conclusive that the right to receive payment from an alien enemy is intended to be left as it stands at common law. It is perhaps not immaterial to observe that the word 'transactions' is used in this clause as in clause 5 of the Proclamation of October 8. In this clause the word clearly refers to the business dealings in respect of which the right to payment arises and does not include, but is used in contradistinction to the payments themselves."

Under these decisions, it is clear that so far as England was concerned, it was lawful for Watts, Watts & Company, Limited, to receive, and for their alien enemy debtor, the *Unione Austriaca di Navigazione*, to pay to them in England, the amount involved in this case.

Whether by so paying the Unione Austriaca di Navigazione would have been guilty of a breach of Austrian law is not material to the present controversy, because Austria was not the place of payment and its law did not govern the legality of the payment.

2. Further, it is clear under British law that if jurisdiction could have been obtained by Watts, Watts & Company, Limited, over the Unione Austriaca di Navigazione, they could have maintained an action for the amount due for the coal in the English courts. *Robinson v. Continental Ins. Co. of Mannheim*, 31 T. L. R. 20, [1915] 1 K. B. 155; *Ingle v. Mannheim Insurance Company*, 31 T. L. R. 41, [1915] 1 K. B. 227; *Leader, et al. v. Direction Der Disconto Gesellschaft*, 31 T. L. R. 83, [1915] 2 K. B. 154. Cases offered under Stipulation, fols. 353-359.

Our law is the same as the English law in this regard. Our Supreme Court has said that "whatever may be the extent of the disability of an alien enemy to sue in the courts of a hostile country, it is clear that he is liable to be sued, and this carries with it, the right to use all the means and appliances of defense." *McVeigh v. U. S.* 1870, 11 Wall. 259, 267, citing *Bacon's Abridgement, Tit. Alien, d*; *Story's Equity Pleadings*, Sec. 53; *Albrecht v. Sussman*, 2 Vesey & Beam, 323; *Dorsey v. Kyle*, 1869, 30 Md. 512, 522, 96 Am. Dec. 617; Cf. *Pollock on Contracts*, 8th ed., p. 100.

3. Sir William Plender's alleged embargo, fols. 44-63, on the payment of drafts by Austrian banks, was much emphasized by the respondent's counsel in their brief

below. They seem to have misconceived the power and authority of Sir William Plender and the scope of his alleged embargo.

The question of Sir William Plender's powers arose in the case of *Cooper v. Deutsche Bank of Berlin*, in the Glasgow Sheriff Court, decided 20 November, 1914, and reported in *Trotter's Law of Contract During War*, p. 452. That case was offered in evidence at the trial. It held that Sir William Plender's alleged embargo, if it existed, was *ultra vires*, because *he was authorized to refuse only such payments as appeared to him to be contrary to the interest of the nation*, and as the Sheriff's Court wisely remarked, *Trotter*, p. 452:

"It could never be suggested that it was contrary to the national interest that a British creditor should recover a debt due to him by a foreign debtor albeit that debtor was also, as it happened, at the moment an alien enemy."

A similar situation arose in the case of *Leader, Plunkett & Leader v. Direction Der Disconto Gesellschaft*, [1915] 2 K. B. 154, decided in the King's Bench Division, by Mr. Justice Scrutton, on November 26, 1914.

In that case the plaintiffs, who were solicitors, had an account with the defendants' head office at Berlin. On August 1 they asked the head office at Berlin to remit their credit balance. This was refused, and after the outbreak of war, they served a writ on the London branch of the bank. The plaintiffs obtained judgment. The defendants appealed. Mr. Justice Scrutton gave judgment for the plaintiffs, holding that service on the London branch was good, and further that as the de-

fendants had entered a general appearance and only subsequently tried to limit their appearance by a letter stating that the appearance was for the branch only, they must be held to have appeared generally. That also is a point of interest in the present case.

In the *Leader* case the bank itself was the defendant.

In the present case, the reason that the libelant was unable to proceed in the English Courts was that it could not get jurisdiction over any property or funds of the respondent in England. If it had been able to do so, it could have prosecuted its action to judgment there under the authority of the decision quoted.

The situation in this regard was very clearly stated by Vice Chancellor Stevens in the remarks quoted above from the opinion in the case of *Compagnie Universelle de Telegraphie et de Telephonie Sans Fils v. United States Service Corporation, et al.*, where he said, 84 N. J. Eq., page 610:

“These citations demonstrate that even in the view of the belligerents themselves, contracts entered into before the beginning of hostilities continue in force during the war; that they may be sued upon, if to the disadvantage of the alien enemy defendant; that the alien enemy may always defend and that he may, in exceptional cases, sue.”

4. In the libelants' brief in the Court below, it was urged that the libelants were prevented by their own law from collecting any money paid into the London Branch of the *Laender Bank* to meet the drafts.

This contention, as we have shown, is erroneous. Even if correct, however, it would not help respondent

It is not alleged that any particular fund was set apart to pay these drafts. But even if there was, that would not alter the situation.

A debtor may not be excused by the plea that he has lost his money or that it has been taken from him or that the bank where his deposit was has failed.

The creditor's right to secure a judgment is not affected by the fact that a third party has taken his debtor's funds in whole or in part.

Furthermore, the alleged act of the British Government, not being instigated by the libellant, may not be imputed to it.

This case involves a private debt and private parties only. The debt has been admitted. The debtor has submitted itself to the jurisdiction of our Courts by general appearance and has put forward no defence in its pleadings, but the Courts below have without justification refused to adjudicate the case and allowed the respondent to escape the results of his appearance and admission of the indebtedness.

c. The fact that the action is between foreign corporations is not any reason for not taking jurisdiction.

The respondent asserted in the courts below that where an action is brought by a non-resident against another non-resident for damages on a contract which is made outside of the United States to be performed outside of the United States, the District Court in its discretion ordinarily does not take jurisdiction if one party objects. It will be noted that the respondent's contention even if valid does not apply to this case, since the con-

tract ~~to~~ furnish coals is not executory but is executed. *The action is brought for the agreed value of the coals furnished, not for damages for failure to furnish coals.*

The respondent cites as authority for his contention the case of *Goldman v. Furness, Withy & Co.*, 101 Fed. 467, decided in the Southern District of New York by Judge Brown. In this case the libel was dismissed because there were substantial reasons why the case should be tried in Canada, where nearly all the witnesses were resident. Judge Brown in his opinion says, page 469:

“Every circumstance opposes the trial of this cause within this jurisdiction and makes that of Canada more appropriate.”

Furthermore in the Goldman case objection to the jurisdiction was taken in a timely manner by a motion to dismiss.

An examination of the cases where our courts of admiralty have in their discretion declined to take or exercise jurisdiction of a libel shows that in no case was the jurisdiction declined where the court felt that a refusal to hear and determine the complaint would amount to a denial of justice or thus work hardship upon the libellant. The courts of this country have consistently taken and held jurisdiction where there are no other courts available, regardless of the pressure of business in our courts, and in some instances of the protests of consuls of foreign countries whose subjects were involved in such litigation. *Chubb v. Hamburg-American Packet Co.*, 39 Fed. 431; *The Amalia*, 3 Fed. 652; *Boult v. Ship Naval Reserve*, 5

Fed. 209; *The Walter D. Wallet*, 66 Fed. 1011; *The Atualita*, 238 Fed. 909; *The Troop*, 118 Fed. 769; *The Noddleburn*, 30 Fed. 142; *The Lady Furness*, 84 Fed. 679; *Aktieselskabet K. F. K. v. Rederiaktiebolaget Atlantan*, 232 Fed. 403; *The City of Carlyle*, 39 Fed. 807; *The Sirius*, 47 Fed. 825; *Bolden v. Jensen*, 70 Fed. 505; *The Ucayali*, 164 Fed. 897; *The Ester*, 190 Fed. 216.

d. *Sale of the Martha Washington is not involved in a recovery.*

The respondent's further argument that the court should not compel a sacrifice sale of the steamship *Martha Washington* is without merit, for the reason that since the certiorari was granted the vessel has been released from attachment by the giving of a bond.

e. *There is no suspension of claims against an enemy in the home forum or an allied forum.*

The case of *Hiatt v. Brown*, 15 Wall 177, which was relied on as standing for the doctrine that claims between enemy subjects were suspended during the period of the war, was a case of a mortgage given by a citizen of Kansas, a northern state, to a citizen of Virginia, a Confederate state, and the question involved was whether the southern mortgagee could recover interest from the northern mortgagor for the period of the war. This Court held that such interest was not recoverable. This is under the familiar principle that the performance of executory contracts is suspended by war. Trotter, *Law of Contract During War*, p. 39. *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484.

It is quite otherwise in the case of executed contracts when nothing remains to be done except payment of his debt by the alien enemy.

In *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, an alien enemy, lessee of the Prince of Wales Theater, was held liable for rent accruing during the war.

In *Robinson & Co. v. Continental Insurance Co.*, [1915] 1 K. B. 155, a German insurance company was held liable for a loss under a policy of marine insurance.

Furthermore, the case of *Hiatt v. Brown* was an action brought to foreclose a mortgage after peace was declared, and it does not in any way involve the proposition that an enemy subject over whom jurisdiction is properly secured will not be held to pay his just debts during the currency of the war, and that is the case that is presented to this court at the present time.

This Court would not, it is submitted, hear with patience any argument as to the right of Austria to confiscate or of an Austrian subject to refuse to pay a just debt due an American citizen where the Austrian debtor stood at the bar of the court, and the court held property of the debtor or a bond sufficient to satisfy the claim of our citizen.

It is submitted that the ordinary principles of comity, as well as the duty of loyalty and allegiance to our Allies, demands that a British corporation shall receive the same justice at the hands of our courts which an American subject or an American corporation would receive.

THIRD POINT.

BY THE WRIT OF CERTIORARI THE CASE HAS BEEN REMOVED TO THIS COURT AND IS HERE TO BE TRIED DE NOVO. WE ARE NOW AT WAR WITH AUSTRIA. THE SUBJECT OF AN ALLY SEEKS TO RECOVER AN ADMITTED DEBT FROM THE SUBJECT OF AN ENEMY. THE SUIT SHOULD BE SUSTAINED.

Under the doctrine of *Irvine vs. Hesper*, 122 U. S. 256, 266, recently reaffirmed in the case of *Reid vs. American Express Company*, 241 U. S. 544, in which the Chief Justice intimated that the rule of a new trial on an Admiralty appeal was so well settled as to leave no room for discussion whatever, this case is wholly removed to this Court for consideration on the merits. Indeed the *writ of certiorari* by its terms brings up the whole case. *Record*, p. 111.

Therefore this case can be dealt with here on the basis of its merits in the same manner as if it were in the instance court, and this Court will take judicial notice of the international status at the present time, which is that we are not only at war with Germany but since December 7, 1917, have been at war with Austria, the sovereign of respondent.*

* BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
A PROCLAMATION

WHEREAS the Congress of the United States, in the exercise of the constitutional authority vested in them, have resolved, by joint resolution of the Senate and House of Representatives bearing date of December 7, 1917, as follows:

WHEREAS the Imperial and Royal Austro-Hungarian Government has committed repeated acts of war against the Government and the people of the United States of America: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That a state of war is hereby declared to exist between the United States of America and

Thus in the situation in which the case now comes before the Court we have a claim by a subject of a nation in alliance with the United States against a subject of a common enemy. To refuse a recovery under these circumstances would involve not a question of comity or a question of neutrality but a question of loyalty.

It is the duty of the United States in the present circumstances to assist its allies and their subjects in every way possible against enemy nations and the subjects of those nations. Consequently the whole basis of the wholly unwarranted defense which was sustained by the District Court and acquiesced in by the Circuit Court of Appeals when we were neutral, is swept away and the Austrian enemy is before this Court, having admitted the justness of the libelant's claim.

The doctrine is well settled here and in England that although the courts are not open to an enemy as a prosecuting party or plaintiff, (*Caperton vs. Bowyer*, 14 Wall. 216, 236; *Daimler Co. Ltd. vs. Continental Tyre & Rubber Co.* [1916] 2 A. C. 307) enemy subjects may be sued and may defend in the courts.

the Imperial and Royal Austro-Hungarian Government; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial and Royal Austro-Hungarian Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States.

WHEREAS, by sections 4067, 4068, 4069, and 4070 of the Revised Statutes, provision is made relative to natives, citizens, denizens, or subjects of a hostile nation or government, being males of the age of 14 years and upwards, who shall be in the United States and not actually naturalized;

Now, therefore, I, Woodrow Wilson, President of the United States of America, do hereby proclaim to all whom it may concern that a state of war exists between the United States and the Imperial and Royal Austro-Hungarian Government; and I do specially direct all officers, civil or military, of the United States that they exercise vigilance and zeal in the discharge of the duties incident to such a state of war.

As Judge Veeder well said (fol. 396):

“It is apparent, therefore, that to hold a subject’s right of action in his own country against an alien enemy is suspended, would be to defeat the very object of the suspensory rule, and to turn a disability into a relief. This is the municipal law of England. *Porter v. Freudenberg* (1915) 1 K. B. 857; *Robinson v. Continental Insurance Company of Mannheim* (1915) 1 K. B. 155; *Ingle v. Ib.*, 84 L. J. (K. B.) 491; *Leader, Plunkett & Leader v. Direction der Disconto Gesellschaft*. 31 Times Law Repts., 63; *Contierland*, 31 Ib., 248; *Janson v. Driefontein Consolidated Co. Ltd.*, 31 Ib. 178; *In re Mary, Duchess of Sutherland*, 31 Ib., 248; *Janson v. Driefontein Consolidated Mines, Ltd.* (1902) A. C. 484; *Alcinois v. Nigrew*, 4 E. & B. 217; *LeBret v. Papillon*, 4 East 502; *The Hoop*, 1 Chr. Rob. 196; *Ex Parte Boussmaker*, 13 Vesey, Jr. 71; *Albrecht v. Sussman*, 2 Ves. & B. 323.

“It is also the law of this country. *McVeigh v. United States*, 11 Wall. 259; *Hanger v. Abbott*, 6 Wall. 532; *The Julia*, 8 Cranch 181; *United States v. Lane*, 8 Wall. 185; *Briggs v. United States*, 143 U. S. 346; *Kershaw v. Kelsey*, 100 Mass. 561; *Griswold v. Waddington*, 15 Johns. 57; *Whelan v. Cook*, 29 Md. 1.

“And in the absence of proof of the foreign law, it may be taken to be the law of Austria-Hungary and of France. It is in fact the law common to all nations since it is merely a formulation of the instinct of self defense.”

It follows as a proposition ancillary to this that our courts should sustain the just claims of subjects of our allies against enemy subjects.

In *Taylor v. Carpenter*, 3 Story 458, 23 Fed. Cas. 742, it was held that a friendly alien is entitled in the courts of the United States to the same protection of his rights as a citizen of the United States.

The policy of the United States in all cases of complaints made by foreigners is to extend to them the same means of redress as is enjoyed by our own citizens. Moore, Digest of International Law, Vol. 4, p. 7.

In *Société Anonyme Belge vs. Anglo-Belgian Agency, Ltd* (1915) 2 Ch. 409, the Court of Appeal in England held that a Belgian corporation may sue in the English courts, even after the territory of Belgium is largely occupied and controlled by the enemy. At p. 414, Mr. Justice Younger said:

" * * * the court, unless constrained by authority, or except to the extent to which it is required by proclamation or statute so to do, would, I apprehend, hesitate long before it refused to extend its protection to the subject of a State which, so far from being an enemy subject, is the closest ally of the King."

Thus the main contention put forward in the Circuit Court of Appeals on behalf of the respondent has been swept away by the breaking out of war between this country and Austria.

From the cases above cited it will be seen that war does not constitute a closed season for the subjects of our enemies in our courts nor operate to suspend claims against them whether on behalf of our own citizens or the subjects of our allies.

Into the scales of justice the sword has now been thrown.

LAST POINT.

THE DECREES OF THE COURTS BELOW SHOULD BE REVERSED AND THE CAUSE REMANDED TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK WITH INSTRUCTIONS TO ENTER A DECREE IN FAVOR OF THE LIBELANT AGAINST THE RESPONDENT FOR THE AMOUNT SUE FOR IN THE LIBEL, WITH INTEREST AT SIX PER CENT PER ANNUM FROM THE RESPECTIVE DATES ON WHICH THE COAL WAS FURNISHED TO THE SEVERAL STEAMERS OF THE RESPONDENT, TOGETHER WITH THE COSTS OF THIS COURT AND OF THE COURTS BELOW.

Respectfully submitted,

J. PARKER KIRLIN,

JOHN M. WOOLSEY,

CLETUS KEATING,

Of Counsel.

January, 1918.

10
Office Supreme Court, U. S.

F. F. D.

APR 15 1918

JAMES D. MAHER,
CLERK.

United States Supreme Court

OCTOBER TERM, 1917.

No.

25

WATTS, WATTS & COMPANY, LIMITED,
Libelant-Petitioner,
against

UNIONE AUSTRIACA DI NAVIGAZIONE, etc.,
Respondent.

BRIEF FOR RESPONDENT

CHARLES S. HAIGHT,
CLARENCE BISHOP SMITH,
Counsel for Respondent.



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Supreme Court of the United States

WATTS, WATTS & COMPANY, LIMITED, an English corporation,
Libelant-Petitioner,

against

UNIONE AUSTRIACA DI NAVIGAZIONE,
Respondent.

October
Term, 1917.
No. 180.

BRIEF FOR RESPONDENT.

Statement.

1. In this case the libelant-petitioner is a British corporation, the respondent an Austrian corporation, and prior to the filing of the libel these nations were at war with each other. Before the war broke out the respondent, pursuant to an annual coaling contract, had given the libelant drafts payable in London, in return for coal supplied to it in Algiers. The contract, therefore, was made by foreigners, in a foreign land, to be performed in a foreign land.

2. Owing to the war, both Great Britain and Austria-Hungary have passed laws forbidding their citizens to make payments to the citizens of the other nation. Had the positions of the parties

been reversed, the payment of any sum by the libelant to the respondent would have rendered the libelant, under English law, on conviction on indictment, liable to penal servitude "for a term of not exceeding seven or less than three years" and a fine (Ex 20, fols. 295-319). Under Austrian law, if the respondent makes a payment to the libelant the penalty is imprisonment of from one month to a year, and a fine of 50,000 kroners may be imposed in addition (fols. 322-324, 332-333).

3. As a war measure, on August 13, 1914, the British Government put Sir William Plender in charge of the London branch of the Laenderbank, through which the respondent had made arrangements to have the drafts paid, and he was given absolute discretion "to refuse to permit any payment that may appear to him to be contrary to the interest of the nation" (fol. 49). He issued a statement in force at the time that this case was presented to the District Judge, that "domestic bills" (to which class libelant's bills belonged) could not be paid (fol. 62). Therefore, the money which the respondent had in the Laenderbank in London could not be used to pay its drafts. One of the drafts when presented for payment was endorsed, "We are instructed by Sir William Plender, the Controller appointed by the British Government, not to make any payments at present" (fol. 127), and all subsequent drafts (the great majority) were merely endorsed "No advice" (fols. 132, 138, 151, 163, 175, 187, 199, 211, 223, 235, 246).

4. Owing to the retaliatory measures of Great Britain against Austria and of Austria against Great Britain in regard to financial transactions, it became impossible for the libelant to collect the drafts which would otherwise have been paid in

ordinary course, and the libellant accordingly filed a libel in the United States District Court in an effort to do indirectly what it could not do directly. The parties stipulated as follows (fol. 67) :

"By reason of the proclamations in force within the jurisdiction of the said belligerent Powers hereinafter referred to and others which may hereafter be referred to, the above-mentioned drafts amounting to the sum of £8641 9 9, and the above-mentioned sum of £833 6, amounting in all to £8649 13 3, with interest thereon from the due dates of the several drafts still remain unpaid notwithstanding that respondent herein has been at all times ready, able and willing to pay the same."

The natural inference, therefore, is that money was not lacking when the drafts were presented, and this inference is made almost conclusive by the letter of September 19, 1914 (Ex. 25, fols. 347-351), in which the respondent wrote the libellant as follows (fol. 348) :

"We have accepted several drafts for Bunker Coal supplied to our ships, which, *failing advice from our London Bankers, seem not to have been paid up to now*. The whole amount of the drafts accepted with payment due up to September 29th, 1914, is: Lst. 8,641.9.9.

"Of course, it goes without saying, that we wish to confirm our liabilities for the payment of these amounts.

"The legal dispositions taken by the British and Austrian Government (Moratoria) prevent us, however, to fulfil our original undertaking."

This letter certainly does not indicate that before August 7th the respondent had stopped the payment of the draft which was presented on that date, or that non-payment was due to any failure to have a sufficient balance in the London branch of the Laenderbank. On the contrary, it was only because

the respondent had received "no advice" from their London bankers that they reached the conclusion that payments had not been made, due to the "legal dispositions taken by the British and Austrian Government."

5. The respondent's steamer *Martha Washington* was attached on the suit of libellant, and, owing to the war and the consequent interruption of all communications with Austria, the best arrangement that the respondent could make for the trial was to enter into a stipulation which represented a compromise and about the meaning of which the libellant and respondent disagree.

6. On page 3 of its brief the libellant has sought to give the impression that there is no issue of fact in the case. The libellant also states that the respondent admits the indebtedness and the jurisdiction of the Court. These statements are very misleading. While certain facts have been stipulated, as already stated, the parties do not agree upon the construction of the stipulation. The respondent contends that ample funds were provided in the Laenderbank in London to pay the drafts, and that it was merely due to the action of Sir William Plender that these drafts had not been paid, down to the time when the stipulation was made. The respondent accordingly maintains that the drafts have never been dishonored, within the meaning of the original contract of the parties, and that the effect of the acts of the belligerents is to suspend these obligations during the war. While, therefore, the respondent admits that an original debt for the amount claimed in the libel was incurred, it does not admit that such a sum is now due and payable, except through the drafts which were given in accordance with the contract, payment of which has

been stopped by the action of the British authorities.

The respondent admitted that the District Court had the legal authority to hear the case, but it did not admit that the Court, in its discretion, ought to exercise that authority. On the contrary, the respondent prayed in the answer that "judgment be rendered in the premises in accordance with the allegations and proofs which shall be submitted by libelant," and, upon the trial, the District Court was asked, in its discretion, not to take jurisdiction of the case. After careful consideration, that view was adopted by the Court and the decree refusing to take jurisdiction was affirmed by the Circuit Court of Appeals.

The declaration of war by the United States on Austria has not affected the rights of the parties to the litigation. No part of the contract was performed in the United States.

FIRST POINT.

When the lower Court has exercised its discretion in refusing jurisdiction, without abuse, its judgment will not be disturbed.

(a) *The claim that the Court must take jurisdiction is unsound.*

The libelant in its First Point (pp. 10-37) argues that the District Court was required to take jurisdiction, merely because it had the power to do so. Fault is found with the respondent for admitting that the Court had this power, and at the same time asking that the Court should not exercise it on the facts presented. The argument is fallacious.

If the Court must take jurisdiction, against its better judgment, merely because it has the power to do so, there is no discretion whatever.

(b) *The claim that respondent admitted jurisdiction is erroneous.*

On page 15 of the libelant's brief it is stated that the Court, of its own motion, refused to take jurisdiction. This suggests the idea that both libelant and respondent were anxious to have the Court try the case, but that the Judge would not hear it. That, of course, is contrary to the fact.

(c) *Whether jurisdiction shall be taken lies in the Court's discretion.*

It is a difficult matter for the libelant to avoid the inevitable conclusion that this Court will not review a mere exercise of discretion by the District Court. In the libelant's brief, therefore, it is argued (pp. 17-23) that the cases in which the Court has exercised its discretion in the past, in refusing jurisdiction, represent all of the cases which ever can arise in which this discretion may be exercised. That would be an absurd limitation to put upon the Courts. They should continue in each case between foreigners, in connection with contracts to be performed abroad, and made abroad, to decide on the facts of each case whether it is proper and will promote justice to take jurisdiction. This principle is clearly stated in *The Maggie Hammond*, 76 U. S., 435, and *The Belgenland*, 114 U. S., 355, the leading authorities cited by libelant.

In the course of the opinion in the *Maggie Hammond* the Court says:

"Process having been duly served in the district where the ship was found and where the libel was filed, the jurisdiction of the district court is without any well founded legal objection. In this country, says Mr. Parsons, it seems to be settled that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, *but the question is one of discretion in every case*, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum. 2 *Pars. Ship.*, 226; *The Johannes Christoph*, 2 Spink. Adm., 98; *The Jerusalem*, 2 Gall., 191; *The Aurora*, 1 Wheat., 96; *Taylor v. Carryl*, 20 How., 611 (61 U. S. XV, 1038); *The Gazelle*, 1 Sprague, 378." (Italics ours.)

In the course of the opinion in the *Belgenland* the Court says:

"But although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*—that is, where they arise under the common law of nations—special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; *the only question will be whether it is expedient to exercise it.*" (Italics ours.)

Both of these statements of the law make it clear that "the question is one of discretion *in every case.*" In the case at bar a controversy *communis juris* has been modified by the war statutes of belligerent nations.

(d) *The exercise of discretion is primarily for the District Court.*

Under Subdivision "d" of the First Point of appellant's brief (p. 23) the argument made on the application to this Court for a writ of mandamus to compel the Circuit Court of Appeals to again consider the case is repeated. The libelant urges that, since an appeal to the Circuit Court of Appeals is a trial *de novo*, that Court should have exercised its discretion anew about taking jurisdiction, uninfluenced by the decision of the District Judge. The claim is made that the opinion indicates that the Circuit Court of Appeals did not exercise its discretion.

It is important, in the first place, to consider the nature of the decision in this case. All that the District Judge did was to refuse, in his discretion, to hear the case.

It must be admitted that the question which the District Court decided was a matter of discretion. As already shown, the decisions of the United States Supreme Court are clear upon that point, and it is equally clear that the exercise of discretion will not be disturbed, on appeal, unless that discretion has been abused.

Thus, in *Earnshaw v. The United States*, 146 U. S., 60, this Court was considering whether an inferior tribunal had given proper notice to a defendant, and, after considering various cases where a Trial Court had exercised its discretion, said:

"The question in all these cases is whether in respect either to the notice of the trial, adjournments, allowance of pleas, the reception of testimony, or other incidental proceedings the court has or has not acted in the exercise of a sound and reasonable discretion."

In *Sun Cheong-Kee v. United States*, 3 Wall., 320, the Court said :

"Exceptions were taken to various rulings in the progress of the cause, and are made part of the record. The first two related to matters wholly within the discretion of the circuit court, and are not reviewable here. This is not merely settled by repeated decisions, but is expressly directed by an Act of Congress prescribing the limits of this court's jurisdiction upon writs of error to the Circuit Court of California. Act of Feb. 19, 1864, ch. 11 (13 Stat., 7)."

The Act of February 19, 1864, referred to, is substantially the same as Section 700 of the Revised Statutes of the United States, now in force.

See also :

Silsby v. Foote, 14 How., p. 218.

That this Court considers that the question whether the District Court should or should not take jurisdiction is for the *District Court* to pass upon, and that the discretion of the District Court will not be disturbed unless it has been abused appears from the case of the *Belgenland*, *supra*. That was a case of a collision between foreign vessels, where the District Court, in its discretion, took jurisdiction. The Circuit Court heard the case on appeal, and later heard a special reargument on the question of jurisdiction. Yet this Court, in approving the exercise of discretion on the part of the District Court, dealt with the District Court entirely, and rested its conclusions on the proper use of the *discretion of that Court*. Mr. Justice Bradley, speaking for this Court, said :

"As the assumption of jurisdiction in such cases depends so largely on the *discretion of the court of*

first instance, it is necessary to inquire how far an appellate court should undertake to review its action. We are not without authority of a very high character on this point. In a quite recent case in England—that of *The Leon XIII*, 8 Prob. Div., 121—the subject was discussed in the court of appeal. That was the case of a Spanish vessel libeled for the wages of certain British seamen who had shipped on board of her, and the Spanish consul at Liverpool protested against the jurisdiction of the admiralty court on the ground that the shipping articles were a Spanish contract, to be governed by Spanish law, and any controversy arising thereon could only be settled before a Spanish court or consul. Sir Robert Phillimore held that the seamen were to be regarded for that case as Spanish subjects, and under the circumstances he considered the protest a proper one and dismissed the suit. The court of appeal held that the judge below was right in regarding the libelants as Spanish subjects; and on the question of reviewing his exercise of discretion in refusing to take jurisdiction of the case, Brett, *M. R.*, said: ‘It is then said that the learned judge has exercised his discretion wrongly. What, then, is the rule as regards this point in the court of appeal? *The plaintiffs must show that the judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the court of appeal holds, that they are justified in saying he has exercised it wrongly.* I cannot see that any wrong principle has been acted on by the learned judge or anything done in the exercise of his discretion so unjust or unfair as to entitle us to overrule his discretion.’

This seems to us to be a very sound view of the subject, and acting on this principle we certainly see nothing in the course taken by the *district court* in assuming jurisdiction of the present case, which calls for animadversion.” (*Italics ours.*)

Similarly, in *The Dos Hermanos*, 10 Wheat., p. 306, a salvage case, decided when the right of appeal to the Supreme Court existed in admiralty

cases, Chief Justice Marshall said, pages 310 and 311:

"In the present case, the district court has awarded one-half of the prize proceeds, or salvage, to the captors. It was an exercise of sound discretion; and this court would, with extreme reluctance, interfere with that discretion, unless in a very clear case of mistake. We perceive no such mistake in this case, and are well satisfied with the amount of the salvage as decreed by the district court."

Moreover, there is nothing in the case to lead one to conclude that the Circuit Court of Appeals did not exercise its full powers in passing upon the questions involved in this case. It cannot be supposed that that Court is ignorant of the principle that an admiralty appeal is a trial *de novo*.

The case cited for this proposition on the libellant's brief, *Munson S. S. Line v. Miramar S. S. Co., Ltd.* (Brief, p. 24), was decided by the Circuit Court of Appeals for the Second Circuit, as recently as 1909. The whole record in the case at bar came before the Court of Appeals, and the case was fully briefed and argued. It is well settled, however, in trials *de novo* that, where the Trial Court exercises discretion, the Circuit Court of Appeals, like this Court, will not overrule the discretion of the District Judge, unless that discretion has been abused.

The Eliza Strong (C. C. A., 6th Circ.),
130 Fed., p. 99.

*Bearse et al. v. Three Hundred and Forty
Pigs of Copper*, 2 Fed. Cases, p. 1192.

(e) *In refusing to take jurisdiction the Court committed no breach of comity.*

In the last subdivision of Point I of the libelant's brief (pp. 25-37) a fine-drawn argument is given as to whether it is or is not a matter of comity for our Courts to refuse jurisdiction. Such a discussion we believe to be unprofitable. In the exercise of the Court's discretion it is merely a question whether it is expedient to take jurisdiction in each case.

SECOND POINT.

The Courts below properly declined to adjudicate this case.

A. IRRESPECTIVE OF WAR COMPLICATIONS, THE COURT WOULD HESITATE TO TAKE JURISDICTION OF THIS CASE, OVER THE RESPONDENT'S OBJECTION, BECAUSE THE PARTIES ARE FOREIGNERS, AND THE CONTRACT WAS MADE IN A FOREIGN LAND TO BE PERFORMED IN A FOREIGN LAND.

Where an action is brought by a non-resident against a non-resident, in connection with a contract which is made outside of the United States, to be performed outside of the United States, the District Court, in its discretion, ordinarily does not take jurisdiction if one party objects. A leading case on this question is *Goldman v. Furness, Withy & Co.*, 101 Fed., 467, decided in the Southern District of New York. In that case, on the objection of the learned counsel for the libelant in this case, Judge Brown was not willing to take jurisdiction merely because the foreign libelant found it more convenient to sue here, and he also

refused to take jurisdiction after the claim had been assigned to a resident of New York.

In the absence of war complications in the case at bar, the learned District Judge would have had the clear right, in his discretion, to refuse to take jurisdiction and that discretion, once exercised, would not be reversed by this Court merely because the appellant so wished.

Not only are all of the reasons of convenience opposed to the trial, in American courts, of cases involving contracts which are made and to be performed exclusively in foreign countries, but an American Court is not the appropriate forum to pronounce upon questions of foreign law, especially where the parties are all foreigners.

If our Courts once undertake to adjudicate between the citizens of the many belligerent nations of Europe the cases which cannot be tried in the natural and appropriate courts because of enemy alien laws, the resulting complications cannot be foreseen. Contracts between Turks and Russians, for instance, governed by laws and customs wholly unlike our own, would not only be difficult for our Courts to construe, but, with witnesses utterly unable to appear before the Courts, direct injustice would be almost unavoidable.

The difficulties connected with questions of foreign law are always embarrassing. The libellant, while contending in the brief on petition for certiorari (p. 41) that Algerian law should govern the case, and in this brief (p. 2) stating that the suit is for coal furnished in Algiers on a contract signed in Algiers, which amounts to the same thing, has offered a list of cases in Trial Exhibit 2 (fols. 353-359) which were supposed to prove the English law, but this is an unsatisfactory method of doing it. Selected cases may give a one-sided view of the

law. The respondent believed it impossible to prove the Austrian and Algerian law by a similar method. In cases of doubt the Court should be slow to assume that the law of these countries is the same as that of the United States.

Cuba R. R. v. Crosby, 222 U. S., 473.

B. THE COMPLICATIONS OF THE WAR HAVE STRENGTHENED AND EMPHASIZED THE REASONS FOR REFUSING TO TAKE JURISDICTION.

(1) *War prevents intercourse between belligerents and suspends the payment of debts, so that belligerent nations in modern times do not consider it necessary to confiscate debts.*

In order to decide what effect the present war has upon the question of the assumption of jurisdiction by a United States Court, it is necessary to consider, in the first instance, the radical changes in property and in contract rights which are brought about by a declaration of war.

In former times all property of the enemy, private as well as public, including enemy debts, was subject to confiscation on the outbreak of war. In recent times it has been *customary* to confiscate only property at sea; but there can be no question about the right of a belligerent to confiscate every kind of enemy property within its reach, on land and on sea. The only difference between the two kinds of property is that the declaration of war itself makes property at sea subject to confiscation without any law declaring it subject to seizure, whereas a belligerent nation must pass such a law before it can legally confiscate property on land.

1 *Kent's Commentaries*, * 64, 65.

In *Brown v. U. S.*, 8 Cranch., 110, Mr. Chief Justice Marshall said (pp. 122 to 124) :

"Respecting the power of government no doubt is entertained. That war gives to the sovereign *full right* to take the persons and confiscate the property of the enemy wherever found is conceded. * * *

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, *but simply confers the right of confiscation* * * *.

The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and on other property found within the country must be the same." (Italics ours.)

Opposed to this decision of Chief Justice Marshall, the libellant, in the Second Point of its brief, Subdivision "a" (pp. 38-41), cites *Hall on International Law*, p. 459, and *Baglin v. Cusenier Co.*, 221 U. S., 580, an entirely different sort of a case, also *Williams v. Bruffy*, 96 U. S., 176, which was decided on the ground that acts of the Confederate Government were acts of the States and could not conflict with the Constitution of the United States.

Porter v. Freudenberg (1915), 1 K. B., 857, put in evidence as an authority by libellant (fol. 357), shows that the law of England is the same as that of the United States. The Court said (p. 869) :

"Whether the right of the Sovereign to confiscate any of the alien enemies' goods or debts in this realm was ever exercised or not (see *Wolff v. Oxholm* [1817], 6 M. & S., 92, at p. 102, per Lord Ellenborough), there can be no doubt about the existence of the right; see *Attorney-General v. Weeden* (1699), Parker, 267. Gibbs, C. J., in *Antoine*

v. Morshead (1815), 6 Taunt., 237, affirmed the principle that the Crown during the war may lay hands on debts due to the alien enemy, but if it do not, then on the return of peace the rights of the contracting alien are restored and he may himself sue to recover the debts; see also *Walford's Parties to Action* (mentioned later herein), at p. 653, and the authorities there cited from 19 Edw., 4, to *Antoine v. Morshead* (1815), 6 Taunt., 237."

In *The Rapid*, 1 Gallison, 295, Mr. Justice Story said:

"War puts every individual of the respective Governments, as well as the Governments themselves, in a state of hostility with each other. *All treaties, contracts, and rights of property are suspended.*" (Italics ours.)

It is clear, therefore, that the rights and liabilities of the parties in the case at bar have been vitally altered by the declaration of war. "Their contracts and rights of property are suspended," and, in addition, the Austrian Government has the clear right to confiscate the credits of the libellant, by ordering the respondent to pay to the Austrian Government itself, the amount due the libellant. Such a confiscation would have the same effect as the confiscation of one thousand bales of cotton belonging to the libellant and lying on the dock at Trieste, *i. e.*, the cotton would be irrevocably lost. So also the confiscation of the credit would destroy the right of the libellant to recover from the respondent.

(2) *If the Courts do not recognize this suspension of obligations, confiscation of debts by belligerents will be stimulated, which is undesirable.*

As already stated, it is well settled law that the Government of Austria has the right to confiscate this credit which belonged to the libelant at the outbreak of the war, and she can exercise that right *at any time during the war*. A more humane practice has, for some time, prevailed, and has been followed by Austria in this case by merely declaring the Austrian citizen's debt *suspended*. But the vital end to be accomplished by both confiscation and suspension is to prevent a citizen of Austria from paying any money to the enemy. The greater power includes the less, and Austria's power to confiscate the debt, and thus prevent money from reaching its enemy, includes the power to forbid the payment of the debt and so prevent money from reaching its enemy. If this more humane method of dealing with enemy debts is to be effective it must be respected by the Courts.

(3) *This Court should not require the respondent to commit a crime against its own Government.*

As has been stated already, Austrian law has forbidden any payments to English citizens, during the war, and has enacted the penalty of imprisonment from one month to a year, and a fine of Kr. 50,000 if such a payment is made. England has similarly forbidden her citizens to make payments to Austrians, and this is a part of the customary system of hostilities. It can hardly be supposed that this Court would undertake to order a foreign corporation, in such a case as this, to

commit a crime against the laws of its own country. It might be said that, if this Court decrees the payment of this money and the Austrian corporation refuses to make the payment when such payment is decreed, and does no voluntary act to assist in the transfer of money to an English corporation, then the act of payment becomes the act of this Court, and the Austrian corporation will not be subjected to a fine, or its officers to imprisonment. Whether this is the law of Austria, or not, we do not pretend to know; but even if it were, the reasoning shows the impropriety of any such action by a Court of the United States. This Court certainly has no wish to be performing acts which are criminal according to Austrian law. That the laws of a country are binding on its citizens, wherever they may be, will be considered *post*, page 23.

THIRD POINT.

To have taken jurisdiction would have amounted to an abuse of discretion.

As already argued, the fact that the District Court in its discretion declined to take jurisdiction should, in itself, be decisive, since that discretion was not abused. We believe, however, that we can go further and say that the discretion would have been abused had the Court taken jurisdiction.

Compagnie Universelle &c. v. U. S. Service Corporation, cited for libellant, discussed.

The only case cited for the proposition that the United States should entertain a suit between citi-

zens of belligerent nations, during war, is *Compagnie Universelle de Telegraphie v. United States Service Corporation, et al.*, 84 N. J. Eq., 604 (Libellant's brief, pp. 31-36), which was a case relating to land in the United States and, as we believe, not in point. There a bill in equity was filed to compel the specific performance of a contract to convey land at Tuckerton, New Jersey; also for the transfer of certain patents used in connection with a telegraph station on that land. The contract had been signed by one Goldschmidt, on behalf of a German corporation. Patents in the United States had been issued to Goldschmidt, who was a defendant in the case. Meyer, another defendant, was in possession of the plant. The plant had been completed and paid for, and nothing remained but to turn it over to the plaintiffs. The following facts should be noted:

1. *The contract there was not to be performed in the country of either belligerent, but in the territory of the United States.* The two cases, therefore, are absolutely different in this vital particular. In the case at bar jurisdiction would ordinarily be refused, if either party objected, because the contract was made by foreigners, outside of the United States, and to be performed outside of the United States. If the entire performance of the contract is to take place within the United States, the Courts of the United States ordinarily take jurisdiction. This difference between the two cases is emphasized by Vice-Chancellor Stevens in his opinion (p. 611):

"The laws governing real estate are best understood here. The subject matter of the controversy is here and the transfer of the title takes effect here. Under our statute, aliens have the same right to ac-

quire, hold and dispose of land as citizens have and to give effect to this right they must have the same remedies."

2. *Since the contract related to land, the New Jersey Court was the appropriate Court to declare specific performance of it.* No foreign nation can interfere with the sovereign powers of New Jersey to pass upon matters connected with its own land. On the other hand, the situs of the debt in the case at bar was the residence of the Austrian debtor. This point is a development of the preceding point, and shows that no Court, except the New Jersey Court, could give adequate remedy to the parties. Other Courts could merely direct the defendant to execute a deed, but, if he refused, they could not deal with the land itself. This, by itself, is a very strong reason why the New Jersey Court should take jurisdiction.

3. *The main purpose of the retaliatory acts of belligerent nations, is to prevent the resources of one nation from going to the other. But land, after its transfer, must remain in the neutral country. Because of its nature, it can not be sent to France.* Thus the bill of complaint shows that this land was in the possession of one of the defendants, and in carrying out a decree of specific performance, possession would have to be given to someone in the State of New Jersey. The laws of New Jersey give aliens a right to acquire title to land, and its Courts are open to them to enforce their rights in regard to such titles. If a New Jersey Court refused to enforce a contract in regard to land situated in that State, on the suit of a French corporation, it might well be a matter of international complication, involving this country.

The Vice-Chancellor, in the course of his opinion, said (p. 611):

"The present controversy concerns title to land in New Jersey. This is a subject over which the New Jersey Courts have almost exclusive control. In no other jurisdiction can complete relief be afforded;—relief that will operate on the land itself and not merely on the person of the title holder. Defendant's counsel rely upon a class of cases in which it is held that the Court, in the exercise of a sound discretion, may refuse to entertain jurisdiction of a controversy between aliens. These are cases of tort occurring on the high seas or elsewhere, outside of the jurisdiction, or cases of contract made and to be performed abroad. If the Court be of opinion that justice can better be administered in the courts of the domicile of the suitors, it requires them to go there. They are not authorities for the proposition that the Court may refuse to try title to land lying within its jurisdiction if the suitors be aliens."

In an article published in the *Central Law Journal* of September 24th, 1915, a quotation is given from Judge Veeder's opinion and a further quotation from Vice-Chancellor Stevens' opinion, in which the language is unnecessarily broad. In summarizing these quotations, the article says (p. 218):

"It seems to us that, boldly stated as the matter is in both of the excerpts we make, the federal court has the better of the argument. The New Jersey court would have better placed its conclusion to entertain jurisdiction on the ground that the right of action acquired by the French corporation related to a 'right to New Jersey land,' a right that lay wholly outside of control by German law and it was of no concern to this country what the effect of such enforcement might be. Pivoting jurisdiction on this one fact, all of the consequences of

its exercise would be swallowed up in its exercise. Indeed, in the face of such a fact in the New Jersey case, there was no question of rights of alien subjects, belligerent or non-belligerent, involved. In the federal case there was such a question, because the contract itself was foreign, and to it the restrictions of foreign law prevailed and its binding force during war applied."

4. *Moreover, Vice-Chancellor Stevens' decision is not to the effect that the District Court in the present case lacked the power to refuse to take jurisdiction in its discretion.* Vice-Chancellor Stevens states as follows (p. 614):

"Judge Veeder dismissed the suit brought by Watts & Co. He seems to have treated it as one in which exercise of jurisdiction was discretionary, the parties, the contract and the attached vessel being all foreign. He seems to have thought that the pendency of the war and the laws and ordinances promulgated by the belligerents were good reasons for declining jurisdiction. Whether they were or not—and they do not seem to be very obviously so—the case is no authority for the proposition that this Court should refuse to entertain a question of title to land in New Jersey."

It may be that with such consideration as he had given to the matter, Vice-Chancellor Stevens, when he wrote the opinion, stood ready to commit the Courts of this country to the task of trying every dispute between the citizens of the warring nations of Europe, where property can be attached in this country, but he certainly does not find that the United States District Court was *required* to take jurisdiction of a case arising under a contract made abroad, to be performed abroad, and between parties all of whom are foreign citizens.

5. *The laws of a country are binding upon its citizens wherever they may be.* The decision of Vice-Chancellor Stevens also calls for consideration in one other particular. He suggests that "It can hardly be assumed that it was the purpose of the German legislator to attempt to give extra-territorial force to its enactments or decrees respecting lands in foreign countries" (p. 614), and he closes his opinion with the following argument (p. 615) :

"As I have already shown, there is nothing in this legislation, disclosed at least by the plea, that prohibits the German subject from defending against a French claim. But suppose there were. If this Court gave effect to it, it would, in a measure, be enforcing German law, which on well settled principles can have no extra-territorial operation, to the detriment of the French citizen asking to be heard. This it seems to me would be an un-neutral act."

The argument that the prohibition placed by England and by Austria, upon the payment of any claim to an enemy, has no extra-territorial force, is exceedingly misleading if it is applied to a case like the one at bar. The defendant in this case is an Austrian citizen, with its head office permanently located within the jurisdiction of Austria and subject to her control. For that reason the Austrian law, prohibiting payment during the war, is binding upon it. Similarly, the British act prohibiting trading with the enemy applies to Watts, Watts & Co., and prohibits any payment to the citizens of an enemy country, whether that payment is made in London, Vienna or New York. It is the substance of the payment itself which is prohibited, without reference to the place where the payment

is made. This Court does not give extra-territorial force to a German law or to an Austrian law when it recognizes the fact that the defendant brought before the Court is absolutely prohibited, by the law of his own country, from paying the debt which is sued upon, and is subject to heavy penalties if he does so.

The power of a government to prohibit its own citizens from doing any treasonable act beyond its own boundaries is well illustrated by the cases where the Courts of one State have restrained citizens of that State from bringing suit in another State or in a foreign country.

Thus, in the case of *Cole v. Cunningham*, 133 U. S., 107 (1890), it was held that a Massachusetts Court could, by bill in equity, enjoin a Massachusetts citizen from proceeding in an attachment suit in New York, the effect of which, if prosecuted, would be to give him preference over Massachusetts creditors in insolvency proceedings.

In *Riverdale Mills v. The Manufacturing Co.*, 198 U. S., 188 (1905), it was held that the Circuit Court for the District of Georgia could grant an injunction against the prosecution of a suit in Alabama by a Georgia citizen.

In *French v. Hay*, 22 Wall., 250—a similar case—the Court said (p. 252) :

“The Court having jurisdiction *in personam*, had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory.”

In *Dehon v. Foster*, 4 Allen (86 Mass.), 545, Bigelow, C. J. (p. 550), said:

"The authority of this Court, as a Court of Chancery, upon a proper case being made to restrain persons within its jurisdiction from prosecuting suits, either in the Courts of this State, or of other States, or foreign countries, is clear and indisputable."

The same rule prevails in England. In the *Matter of the Belfast Shipowners Co.*, 1 L. R. Irish, 321 (1894), an Irish Court of Bankruptcy, in an insolvency proceeding, made an order restraining a resident of England from prosecuting an attachment in Massachusetts, the effect of which would be to give him a preference. The order of the Vice Chancellor was affirmed by the Court of Appeals.

In *Lord Portarlington v. Soulby*, 3 M. & K., 104, Lord Brougham sustained an injunction restraining the prosecution of a suit in Ireland, and said (p. 108):

The jurisdiction "is grounded like all other jurisdiction of the Court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made, being within the power of the Court."

The same power of a government to control the acts of its citizens is illustrated by *Canada Southern R. R. Co. v. Gebhard*, 109 U. S., 527, decided by the United States Supreme Court in 1883 in connection with a payment to be made in a foreign country.

In that case the Canada Southern Railroad Company issued bonds, the principal and coupons of which were payable at the Union Trust Company

in the City of New York. The Railroad Company became involved financially, and a reorganization scheme was considered and legalized by Act of the Canadian Parliament. Under this scheme the bondholders were to exchange old bonds for new, the payment of which was postponed, and were not to receive payment of certain coupons on the original bonds which had not then been paid. New York holders of bonds, who had not assented to this arrangement, sued in the Circuit Court of the United States for the Southern District of New York, to recover on the original bonds, the principal of which was then due. They claimed that the Act of the Dominion Parliament was not binding and was an impairment of the obligation of contracts. The situation, therefore, is very similar to that in the case at bar. Obligations payable in New York were modified by a statute of the country of which the debtor was a citizen, the statute being passed after the obligation was created. The Supreme Court held that, because the corporation was a corporation of Canada, the Legislature of Canada had a right to pass laws in regard to it, which were binding, even in connection with payments to be made outside of the jurisdiction. In the course of the opinion the Court said:

“* * * every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the

government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

In like manner, it may be said that any Englishman who contracts with a citizen of Austria in times of peace knows that, if war breaks out, the citizen of Austria "must of necessity be controlled" by the laws of Austria. The contract is made with that understanding, and neither party to the contract should complain because payment of the debt is suspended by the laws of the belligerent governments when war does break out.

In the case at bar this Court could not, without an abuse of its discretion, require the respondent to do an act which is admittedly made criminal by Austrian law, particularly since it cannot be questioned that the Austrian Courts have authority to enforce that law as regards the respondent, whose residence is in Austria.

FOURTH POINT.

Libelant's third point, that this case is here to be tried *de novo*. Even if this were the case, this Court should not in its discretion take jurisdiction.

For the proposition that the case is now to be tried *de novo* the libelant cites two cases, *Irvin v. Hesper*, 122 U. S., 256, 266, and *Reid v. American Express Co.*, 241 U. S., 544. Both of these cases hold that an appeal to the Circuit Court of Appeals is a trial *de novo*. Neither of them holds that a hearing on a writ of certiorari to review the proceedings before the Circuit Court of Appeals is a trial *de novo*. The trend of legislation is to have cases disposed of in the Circuit Court of Appeals as far as possible.

If the Supreme Court does, however, consider this to be a trial *de novo* the point remains, will this Court in its discretion take jurisdiction? The facts may be summarized as follows:

Summary of the argument under the three first points as affected by the declaration of war by the United States.

1. English and Austrian corporations signed a contract in Algiers for the purchase of coal in Algiers. The contract was, therefore, made by foreigners in a foreign country and it was performed in a foreign country.

2. Every reason of convenience would require that the case should be tried in Algiers, or some other place where the witnesses are accessible. Precisely for such a reason Judge Brown, in *Goldman v. Furness, Withy & Co.*, *supra* (this brief, p. 12),

refused to take jurisdiction of a dispute between foreigners.

3. The reasons for refusing jurisdiction, referred to in the previous paragraph, were increased by the war, which made it impossible for the Austrian respondent to take any testimony if the case were to be heard here. In this dilemma the parties entered into a stipulation, as to the construction of which there is a dispute.

4. The respondent claims that the stipulation and exhibits show that the drafts given to pay for the coal would have been paid by the London branch of the Laenderbank if it had not been for the sequestration of all the funds of the bank as a war measure. The letter from the respondent stating "we have accepted several drafts for bunker coal supplied to our ships, which, failing advice from our London bankers, seem not to have been paid up to now" (fol. 348), seems clearly to indicate that the bank had been put in funds and did not pay because of the British control of the bank's funds. Presumably these funds will ultimately be applied to the benefit of all creditors. An outstanding dispute on this important question of fact clearly shows that it would have been most unfortunate if the Court had taken jurisdiction, for all the material facts to enable the Court adequately to pass on the questions involved were not before it. The case should not be tried when and where the evidence cannot be fully gone into. This difficulty as to evidence applies to practically all cases between belligerents in time of war, and the rule which this Court lays down should be broadly considered, since it will undoubtedly afford a precedent for the decision of other cases.

5. The argument in the third point of libellant's brief amounts to this:

a. It assumes that the United States Court would entertain as a matter of course in time of war a suit which it would entertain in time of peace: for example, a suit by an American against an Austrian for coal supplied.

b. On the basis of this assumption it argues that a United States Court should entertain an action brought by an *English corporation* against an Austrian corporation on a contract made in Algiers for coal delivered in Algiers, to the bringing of which action the respondent in time of peace might well raise objection.

Proposition "b" does not follow from proposition "a." It might be that the United States Court would hold that it would not allow war to prevent an action being brought by an American against a belligerent which it would ordinarily entertain, but it does not follow that it should therefore allow war to so change its customary practice that it will affirmatively take jurisdiction of a case which otherwise would be refused because the case could more properly be disposed of abroad, where the contract was made and the witnesses are available. War increases the difficulty of presenting the case in a country which has nothing to do with the contract.

FIFTH POINT.

Debts are suspended during war, and for this reason, also, jurisdiction should be refused.

The fact that communication by letter and cable is suspended during war, that testimony cannot be taken in one belligerent country for use in another; that all trading and intercourse is suspended, makes it proper that a United States Court in its discretion should not take jurisdiction of a dispute between an Englishman and an Austrian in time of war. That is the argument of the previous point. We can, however, go further. The same reasons which make it undesirable, unfair and contrary to a broad policy of jurisprudence for a Court to take jurisdiction under such circumstances, have been crystallized into a rule of law, that trading and intercourse between belligerent nations is suspended during war, and that payment of debts is also suspended. The argument of the libelant is therefore unsound. It is not true that a United States Court would take jurisdiction of a suit by an American against an Austrian on a debt incurred before the war, and there is, therefore, not the slightest ground, on any theory, why the United States should take jurisdiction of a suit by an English corporation against an Austrian corporation. This debt has been suspended and is not due at the present time. Authorities to this effect will be considered under Subdivision A; the authorities cited by the libelant in its second point, said to be contrary, under Subdivision B; and the authorities cited by the libelant in its third point under Subdivision C.

A. THE AUTHORITIES OF RESPONDENT.

1. *Authorities on suspension of intercourse generally.*

The Teutonia. The doctrine that one is not obliged to perform a contract made before the war, when its performance has become illegal, is well established law, both in this country and in England. A leading case is *The Teutonia*, L. R., 3 A. & E., 394. In that case a German vessel had been chartered by an Englishman to carry cargo to a French port. War broke out between Germany and France, and the German vessel refused to carry the cargo. The English charterer sued the German owner in an English court, and Sir Robert Phillimore held that the obligation of the German to perform the contract ceased when war was declared. At page 414 the Court said:

"The contract was no longer capable of being performed by the master 'without (to use the phrase of Lord Ellenborough in *Atkinson v. Ritchie*) a criminal compromise of public duty'; for I think it might be reasonably maintained that the prohibition was as stringent in the one case as the other, and that the same legal consequences flow from either state of things. I think that on the 16th of July *The Teutonia* could not have entered Dunkirk with her cargo without being exposed to the penalties of trading with the enemies of her country."

The Privy Council affirmed the judgment (L. R., 4 P. C., 171-187). Lord Justice Mellish, delivering the opinion of the Court, said (p. 181):

"The argument for the Appellants assumes, that the breaking out of the war rendered the performance of the charter-party illegal, and that, therefore, the contract between the parties was dis-

solved; and *there can be no doubt that the war did render it illegal for the Teutonia to enter any French port.*"

It is important to notice that the decision in this case was rendered by an English Court, on the suit of an English charterer, and the Court held that one belligerent, the German owner, after war was declared, could not be compelled to carry out the contract, since it was unlawful *by the laws of Germany*, which forbade the ship to trade "with the enemies of her country." England thus recognized the law of a foreign belligerent nation.

The Schooner Rapid. A leading case in this country, which lays down the general principle that all trading with the enemy is suspended during war is *The Schooner Rapid*, 1 Gal., 295, decided by Mr. Justice Story, sitting in the Circuit Court of Massachusetts. The case is instructive in pointing out that the rule is a general one, in the absence of some special license or proclamation altering international law, and that it will make no difference whether the act is one which wholly benefits a citizen of the United States, at the same time giving no aid to the enemy.

The *Rapid* was used by an American citizen in the War of 1812 to call at Indian Island in Nova Scotia to get seven boxes, one trunk and two bales of goods which belonged to him, title being in him before the outbreak of war. The vessel was captured as a prize, and the question was whether this going to Nova Scotia for American goods was legal. Judge Story held that it was not, and said (pp. 302, 303) :

"I will not take up time in considering the general question. After the elaborate dissertation of the learned Bynkershoek, the able decision of Sir William Scott in *The Hoop* and the judgment of the king's bench in *Potts v. Bell*, upon the masterly argument of Sir John Nicoll, it must be considered as a settled principle of maritime and national law, that all trade with the enemy, unless with the permission of the sovereign, is interdicted, and subjects the property engaged in it to the penalty of confiscation. Nor do I consider this as a modern principle. It may not be found laid down in terms of Grotius, Puffendorf, or Vattel, but it irresistibly flows from the current of their reasoning. Indeed, the treatises of these great writers upon national law are admitted to be imperfect on many maritime questions. War puts every individual of the respective governments, as well as the governments themselves, in a state of hostility with each other. *All treaties, contracts and rights of property, are suspended.* The subjects are in all respects considered as enemies." (Italics ours.)

The opinion continues (p. 304) :

"* * * it is argued, that a citizen of one country has a right to withdraw his property, acquired before the war, from the enemy country, provided he does it as soon as he can, after the commencement of hostilities; and further, that such a withdrawal is not a trading with the enemy.

If there be such an exception to the general rule, I should be glad to see it supported by some authority. It is not sufficient to show that the case may be of extreme embarrassment and hardship; for arguments of that sort are not properly addressed to a judicial tribunal; and if real, the difficulty may be completely obviated by a license from the government."

The important point to note is that the relations which exist between individual enemies during war are treated by a general rule, and individual in-

stances are not considered to determine whether some person in this country, or the country as a whole, will be benefited thereby. Emphasis is put upon the stopping of all intercourse, and the mere taking of goods without any element of purchase is called *trading*. It is similarly stated, by way of illustration of this general principle of law which suspends all relations between individuals of belligerent nations, that all *contracts* and rights of property are *suspended*. This brings us to the question directly in issue.

2. *Authorities on the suspension of debts during war.*

At the outset it is interesting to note not only that all debts are suspended during war, but, because of the cessation of the obligation to pay during that period, no interest during the war period is due. This shows the emphasis with which this general rule is laid down. The courts might well have held that, while war suspends all trading, debts and obligations during war, still the debtor company has the benefit of the money during the war period, and, consequently, when the creditor is allowed to sue after the termination of war, it is entitled to the principal plus interest, which represents the value of the use of the money during the war period. The courts, however, go further and hold that no interest is due because the obligation is absolutely suspended. It is clear, therefore, that a court would not entertain jurisdiction of a suit by an American citizen against an Austrian, because the obligation is suspended at the present time. The leading case on this subject is *Hiatt v. Brown*, 15 Wall., 177, decided in the United States Supreme Court in connection with the Civil War.

Hiatt v. Brown. In that case an action was brought to foreclose a mortgage given by a citizen of Kansas, a Northern State, in favor of a citizen of Virginia, a Southern State. The mortgage was made May 29, 1860, and became due one year thereafter, after war had begun. The Court held that the obligation to pay was suspended during the war, and that there was no "revival of the debt," and no obligation to pay interest, until the war had ceased. Foreclosure was allowed after the war ended, but interest for the period of the war was deducted. The Court said (p. 185) :

"As the enforcement of contracts between enemies made before the war is suspended during the war, the running of interest thereon during such suspension ceases. Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention, and it would be manifestly unjust to exact such compensation, or damages, when the payment of the principal debt was interdicted. The question whether interest should be allowed on such contracts during the period of war was much considered soon after the Revolution. In the case of *Hoare v. Allen*, 2 Dall., 102, decided in 1789 by the Supreme Court of Pennsylvania, it was held that interest did not run during the war on a debt owing to an enemy, contracted previously. 'Where a person,' said the court, 'is prevented by law from paying the principal, he shall not be compelled to pay interest during the prohibition.' The legislation of Congress after the commencement of the War of the Revolution, like the legislation of 1861, prohibited commercial intercourse with the inhabitants of the enemies' country, and the court observed that the defendant could not have paid the debt to the plaintiff, who was an alien enemy, without a violation of the positive law of the country and of the law of nations, and that parties ought not to suffer for their moral conduct and their submission to the laws. The decision was followed by

the same court in *Forcraft v. Nagle* (2 Dall., 132), in 1791. Similar decisions were rendered by the Court of Appeals of Virginia and the Court of Appeals of Maryland.

The counsel for the complainant attempts to draw a distinction between those contracts in which interest is stipulated and those to which the law allows interest, and contends that *the revival of the debt* in the first case, *after the termination of the war*, carries the interest as part of the debt; while in the latter case interest is allowed only as damages for the detention of the money. We are, however, of opinion that the stipulation for interest does not change the principle which suspends its running during war." (Italics ours.)

The proctor for the libelant tries to distinguish this case by alleging that the doctrine of suspension of debts applies only to executory contracts, not to contracts where nothing remains to be done but the payment of money (Brief, pp. 49, 50), but in the *Hiatt* case the money was due during the war, just as is claimed in the case at bar, when the drafts were not paid, yet the Court held the debt suspended.

The same result has been reached in England in cases where the law has not been changed by license or proclamation.

In *Du Belloir v. Lord Waterpark*, 24 Rev. Rep. (Great Britain), 628, S. C. 1 Dowl. & Ry., 16-20, decided by the King's Bench in 1822, a jury failed to give interest on a note due to a Frenchman who had been an alien enemy most of the period since the note had been made.

Abbott, *Ch. J.*, said (p. 630) :

"But there is another objection to the plaintiff's recovering interest on the debt, for during the

greatest part of that time he was an alien enemy, and could not have recovered even the principal in this country, and at all events, during that portion of the time the interest could not have run, and it would even have been illegal to pay the bill whilst the plaintiff was an alien enemy."

Bayley, J., and Holroyd, J., concurred.

It is impossible to distinguish between principal and interest, as the above quotations show. Interest is not allowed during war for the sole reason that while war lasts there is no obligation to pay the principal.

In *Rederei Actien Gesellschaft Oceana v. Clutha Shipping Company, Limited*, 226 Fed., 339, a suit was brought in the United States by a German corporation against an English corporation for charter hire, while the two nations were at war. Judge Rose, refusing jurisdiction, said (p. 342) :

"The law is well settled that such a debt is not discharged by the war. *Janson v. Dreifontein Consolidated Mines, Ltd.*, *supra*.

In proceedings of an equitable nature the courts will try to insure that when peace is restored due payment shall be made. *Ex parte Boussmaker*, 13 Vesey, 71. Nevertheless, the alien enemy cannot compel payment during hostilities, nor can the debtor lawfully pay him. This has long been the recognized law of Germany, of England and of the United States—the countries of the residences of the parties and the country in whose courts the instant suit is pending."

That this Court should not enforce during war an obligation which is suspended during war needs no argument.

B. AUTHORITIES CITED IN LIBELANT'S SECOND POINT, IN SUPPORT OF ITS CLAIM THAT THIS DEBT WAS NOT SUSPENDED DURING WAR, CRITICIZED.

The libelant deals with this subject in its second and third points (pp. 37 to 54). Each authority cited will be discussed to show that it does not support libelant's contention.

a. *Libelant's treatment of the confiscation of debts.* Subdivision "a" of libelant's second point (their brief, p. 37) reads:

"a. The respondent's contention that the theoretical rights of Austria to confiscate debts owed to enemy subjects was a ground for not enforcing the libelant's claim is without merit."

This subject has been dealt with *supra* (p. 14), and it has been shown that the Supreme Court of the United States, in a case in which Mr. Chief Justice Marshall wrote the opinion, held that debts may be confiscated during war.

b. *Respondent claims that the contract is governed by Algerian law, not English law.* Subdivision "b" of libelant's second point (their brief, p. 41) reads:

"b. If, as the respondent claims, the giving of the drafts made the place of payment under the contract London instead of Algiers, payment would have been legal and enforceable there, and consequently there is no ground, on the respondent's own theory, for refusing a recovery in the present case."

The libelant's brief continues (p. 41):

"The point taken by counsel for the respondent in the lower courts that the drafts constituted payment, and that there has been a novation by acceptance of the drafts is refuted by the terms of

the contract itself, which provides not only for acceptance but payment of drafts as a means of payment under the contract. The drafts were not substituted obligations, but were merely a means of paying in London instead of paying in cash in Algiers when the coal was furnished."

The statement of respondent's position is erroneous. Respondent does not claim and never has claimed that there has been a novation between the parties, but alleges and always has alleged that the drafts were given as conditional payment. All that respondent claims is that in this suit, which is brought for goods furnished in Algiers under a contract made in Algiers, it is a part of the libelant's case to show that payment of the drafts which were given in conditional payment has been refused within the meaning of the contract, and that the drafts should be surrendered in connection with any suit which the libelant brings on the basis of the original sale in Algiers.

The present argument, advanced by the libelant as respondent's argument, seems to be an attempt to substitute British law for Algerian law. The libelant itself, in no part of its brief, goes contrary to its pleadings and claims that the contract ought to be governed by British law. In the brief for petition for writ of certiorari, filed in this Court by the libelant, at page 41 the libelant said:

"The obligation which arose on furnishing the coal was for the law of Algiers, which is a French possession, to say."

There certainly cannot be the slightest ground for any claim that this contract is governed by British law.

1. *Effect of the British license to sue in the present war* (see Libelant's Brief, p. 42). The purpose

of stating that respondent claims that the case should be governed by the law of England becomes very clear when the libelant quotes on page 42 of its brief Section 7 of the Trading with the Enemy Proclamation No. 2 of King George, which gives a *special license or permission* to English creditors, in connection with this war, to sue in England to collect their debts from enemies under certain conditions. The libelant sums this up as follows (Libelant's Brief, p. 42) :

"Thus express permission was given to a person or a corporation in the position of the libelant to receive payment from an enemy, without being guilty of a prohibited transaction with him. This is clearly pointed out by Lord Strathclyde in the case of *Oronstein & Koppel v. Egyptian Phosphate Co., Ltd.*, 1914, 2 Scotch L. T., 293."

The fact that an express permission was given in England to enable creditors to sue under the policy laid down for Great Britain for this war, and for this war only, allowing suit in certain cases, is evidence that the statement of the law made by respondents that contracts are suspended during war is correct. The passage in the opinion of Lord Strathclyde referring to the effect of Article 7, to which libelant refers, holds that money cannot be paid to the enemy because no authority to do so is given in the proclamation, and says (2 Scotch L. T., 293, at 295) :

"That article gives express permission to persons resident or carrying on business in the United Kingdom to receive payments from an enemy in the sense of the Royal Proclamation in two cases: (first) in the case of past transactions, and (second) in the case of transactions otherwise permitted, and including a transaction properly falling within the sixth article of the Royal Proclamation.

Now, if it were deemed necessary to give express permission, even in the case of past transactions, and in the case of permitted transactions, to a person resident in his Majesty's dominions to receive money from the enemy, the inference seems to me to be plain that, in such cases—past transactions or permitted transactions—express permission would require to be given to a person resident in this country to make payment to an enemy. No such express permission is given. * * *

Ingle v. Mannheim Ins. Co. (1915), 1 K. B., 227, was a case where the plaintiff was insured by the defendant, the London branch of a German insurance company, before the present war broke out, and sued to recover. Sections 5 and 7 of King George's Proclamation above referred to were construed, and it was held that the plaintiff was entitled to bring suit.

2. *The rights given to British citizens by special statute to sue during the war in the English Courts has no bearing on this case. Our law is not to the same effect* (see Libellant's Brief, p. 44). The cases cited by libellant on this point are as follows:

Robinson & Co. v. Continental Insurance Co. (1915), 1 K. B., 155. The plaintiff, an Englishman, sued a German insurance company for a loss which occurred before the war broke out. The case is instructive because in it Judge Bailhache considers the law as it existed in England prior to this war. He said, pages 159, 160:

"I know of no modern English authority on the point except a statement by Lord Davey in the *Driefontein* case, where he lays down three rules which he says are established in our common law, and expresses the third rule thus: 'The third rule is that, if a loss has taken place before the com-

mencement of hostilities, the right of action on a policy of insurance by which the goods were insured is suspended during the continuance of war and revived on the restoration of peace.'

If this is a correct expression of the rule, it covers by its terms the case of an alien enemy defendant as well as an alien enemy plaintiff. It is not the decision of the House of Lords in that case and is not therefore binding upon me, although, of course, it is a statement of the law entitled to great weight."

It appears, therefore, that down to the present war the only authorities in England on the subject were the dictum in this House of Lords case, which, so far as it goes, is favorable to respondent, and the case of *Du Belloix v. Lord Waterpark*, *supra*, p. 37, in which Judge Abbott, *C. J.*, reached the same result that was reached by this Court in the *Hiatt* case, that no interest could be allowed because debts are suspended during war.

Ingle v. Mannheim Ins. Co. (1915), 1 K. B., 227 (Libelant's Brief, p. 44), was previously cited on page 42 and has been construed in that connection.

Leader et al. v. Direction der Disconto Gesellschaft, 31 T. L. R., 83 (1915), 2 K. B., 154, was a case where the plaintiff, a depositor in a German bank, asked its London branch, which was licensed to do business after the war broke out, to pay him his deposit. It was *held* that the plaintiff could sue defendant for its refusal to pay.

McVeigh v. U. S., 11 Wall., 259. This is the first United States case cited by the libelant as in alleged conflict with *Hiatt v. Brown*. It therefore deserves careful consideration. A libel of information under the Act of July 17, 1862, was brought by

the United States against McVeigh for the purpose of forfeiting certain of his real and personal property on the ground that he had been aiding, countenancing and abetting the Confederacy within the terms of the Act. In the District Court a defense offered by McVeigh was stricken out on the ground that he was a rebel and could have no standing. This, the Supreme Court pointed out, would be an act of great injustice, and said:

"The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

Libellant's brief (p. 44) then states that the following authorities were cited in the *McVeigh* case:

Bacon's Abridgement, Tit. Alien, d.

Story's Equity Pleadings, Sec. 53.

Albrecht v. Fuzsman, 2 Vesey & Beam, 323.

Dorsey v. Kyle, 1869, 30 Md., 512, 522, 96 Am. Dec., 617.

cf. *Pollock on Contracts*, 8th Ed., p. 100.

Bacon's Abridgement reads as follows:

"For, as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery."

Story's Equity Pleadings, Sec. 53, deals with the question whether an alien enemy, when sued, can have a bill of discovery.

Albrecht v. Sussman 2 Vesey & Beam, 323, was a case where an alien enemy was not allowed to sue in an English Court as plaintiff and the obligation of the defendant to pay was suspended during war.

Dorsey v. Kyle, 30 Md., 512, was a case where a debtor resident of Maryland, after the Civil War broke out, left northern territory, went to Virginia and entered the Confederate Army. *Held*, that his departure and enlistment did not prevent his being sued by Maryland creditors.

Pollock on Contracts, 8th Ed., p. 100, says:

"Alien enemies, as we have seen above, are disabled from suing in an English Court even if the cause of action arose in time of peace, but not from binding themselves by contract during war between their country and England, nor from enforcing such a contract after the war has ceased."

There can be no question about the correctness of the decision in the *McVeigh* case, which has, however, nothing to do with the suspension of debts during war. The United States Government had a clear right to pass an act forfeiting property of citizens engaged in acts of rebellion, and had the further right to bring such a case to trial during war. The act, like those which arise in prize cases, was an infringement of its sovereignty committed during war. This case and the authorities cited in it do not in any way affect the question whether contractual obligations are suspended during war, and the only point which is instructive is the insistence of the Court on high standards of justice.

3. *Subdivisions 3, 4, "c" and "d" of libellant's brief digressions.*

In Subdivision 3 (Libellant's Brief, pp. 44 to 46) libellant argues that Sir William Plender would certainly have paid the drafts if he had the money in the Laenderbank, but this argument is unsound. Sir William Plender might well think that in the early stages of the war it was better to hold the funds for the benefit of all creditors awaiting further developments.

The statement in Subdivision 4 (Libellant's Brief, p. 46), that the debt has been admitted, is misleading, as has been above stated. Respondent admits that the debt would have been paid in due course by the Laenderbank except for the war and the regulations connected therewith. It is certainly a part of libellant's case to show that such action has been taken in Great Britain that the original claim on which suit is brought has been reinstated, and that respondent will not be forced to pay twice, through suit here on the original claim, while drafts are outstanding. This is a point absolutely separate from the suspension of debts point.

On Subdivision "c," the point that the suit is between foreigners, and "d," the attachment of respondent's vessel, nothing further need be said.

c. *Libellant's discussion of the suspension of debts during war.* Libellant's Subdivision "e" reads (Libellant's Brief, p. 49):

"There is no suspension of claims against an enemy in the home forum or an allied forum."

Thus, we come to the crux of this branch of the case. In criticising *Hiatt v. Brown*, the general principle that contracts are suspended during war

is admitted, but the point is made that this principle applies only to executory contracts, and the case of *Janson v. Driefontein Consolidated Mines, Ltd.* (1902), A. C., 484, is cited. That case, which was one where the facts were similar to the case at bar, does not justify the suggested distinction. There war insurance was effected by an English company in favor of a resident of the Transvaal before the outbreak of war between Great Britain and the Transvaal, and the loss occurred also before the outbreak of war, on October 2, the war breaking out on October 11. It was taken as an admitted fact in the case that the action to collect insurance was brought after peace had been made, and the only question which was raised was whether the insurance was legal. In the course of his opinion Lord Davie said (p. 499):

"The third rule is that if a loss has taken place before the commencement of hostilities, the right of action on the policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace."

It appears, therefore, that this cause of action was no more executory than the cause of action in the case at bar can be called executory. It was merely a question of the suspension of a debt which existed before the war broke out.

The case is authority for libellant that debts are suspended during war.

Halsey v. Lowenfeld (1916), 2 K. B., 707. This case, also cited under Subdivision "e," is instructive, because it shows that Subdivision 7 of the proclamation really turns the Courts into an engine of warfare rather than a tribunal of justice.

We do not desire to express any criticism of Great Britain in this regard. It is a question for every nation to decide what it considers good policy to do by way of retaliation, and what steps of war should be entered into, but the English proclamation certainly shows that the policy of that nation is drastic, and it does not affect the decision in this case. Halsey's assignor leased a theatre to the defendant Lowenfeld in 1895 for twenty-four years, and gave covenants of quiet enjoyment and to keep premises in good repair. Lowenfeld was an Austrian. In 1899 Lowenfeld sublet the premises to Edwards, who subsequently sublet to Leigh, who sublet to Curzon. Lowenfeld had thus ceased to be the actual tenant of the premises for about fifteen years before the war broke out, and in justice should have had nothing to do with the payment of the rent. When sued he set up the defense that the contract was suspended during war, and that if the Court should not so hold, asked that he be given leave to bring in Leigh and Curzon, the sub-tenants, so as to charge them with the rent. The Court held that he could not do this, for this would be practically taking part in the case as a plaintiff. The Court further held that to hold the lease in force was not to force an Englishman to trade with the enemy, for under Section 7 of the proclamation collecting a debt was not trading with the enemy (pp. 712, 713). The result of the case therefore was that Curzon or Leigh, who should have paid the rent, did not have to do so, and the Austrian, who had nothing to do with the theatre for years, did.

C. AUTHORITIES CITED IN LIBELANT'S THIRD POINT FOR THE PROPOSITION THAT DEBTS ARE NOT SUSPENDED DURING WAR CRITICISED.

1. *British Authorities.* In this point libelant cites two authorities on page 52, for the proposition that enemy subjects may defend in the courts, which is unquestioned, whenever a suit is properly brought in regard to some claim which is not suspended during the war. The first authority cited by the libelant, however, does not seem to be very much in point:

Caperton v. Bowyer, 14 Wallace, 216. In this case the defendant falsely imprisoned the plaintiff during war and it was held that after the war was ended the plaintiff could sue the defendant. In the course of the opinion Mr. Justice Clifford, writing for the Court, said, page 236:

"Enemy creditors cannot prosecute their claims subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any action in the tribunals of the other belligerent. Absolute suspension of the right to sue and prohibition to exercise it exist during war, by the law of nations, but the restoration of peace removes the disability and opens the doors of the courts."

This language accords with the contention of the respondent.

Daimler Co. Ltd. v. Continental Tire & Rubber Co. (1916), 2 A. C., 307, the next case cited, held that an action by an English corporation, whose stockholders were Germans, could not be maintained after the beginning of the war, because the directors in Germany could not legally give directions to institute such a suit.

The dictum of Judge Veeder, and authorities in support of it. The libellant adds one citation, a dictum by Judge Veeder, for the proposition that debts are not suspended during war. Since Judge Veeder refused to take jurisdiction in this case his observation is dictum and a glance at the cases which he cites, many of which we respectfully submit are not in point, seems to show, that the dictum was not carefully considered. To determine what weight should be given to the dictum the cases will be briefly analyzed. Where the citations, as given in libellant's brief, are obviously erroneous they will be corrected.

In *Porter v. Freudenberg* (1915), 1 K. B., 857, the Court held that under the King's proclamation made in this war an enemy cannot sue as plaintiff but can be sued as defendant in connection with a claim which arose before the war began. The case is interesting because the Court points out the difficulty which arises, in acting under the King's proclamation, in giving notice to the enemy alien which will enable him properly to protect his rights. On page 883, Lord Reading, *C. J.*, said:

"The real difficulty that arises in seeking to enforce a right against an alien enemy is that of fixing him with proper notice of the suit and the proceedings in the action, with which we will deal later."

In one of the three cases which were before the Court the enemy alien was a plaintiff who had been defeated in the lower Court before the war, and desired leave to appeal, which leave was refused. In the other two actions in which enemies were sued, both cases were referred back to the Trial Court on the ground that the type of service which was satis-

factory before the war began would not be satisfactory in a case like this, the Court insisting on more satisfactory service. It is obvious in the case at bar that if the United States were to adopt England's retaliatory practice, treating debts as not suspended during war, some more satisfactory service ought to be made upon enemy aliens than can be made through the common admiralty attachment of a vessel.

Robinson v. Continental Insurance Company of Mannheim (1915), 1 K. B., 155, has been discussed, *supra*, page 42.

Ingle v. Mannheim Continental Insurance Company, 84 L. J. (K. B.), 491, has been discussed, *supra*, page 42.

Leader, Plunkett & Leader v. Direction der Disconto Gesellschaft, 31 Times Law Reports, 83 (not page 63 as given in libelant's brief), has been discussed, *supra*, page 43.

Continental Tyre & Rubber Co. Ltd. v. Daimler Motor Co., Ltd., 31 Times Law Reports, 159 (not 178 as given in Judge Veeder's opinion, fol. 397), held that an English company, all of whose stock was owned by enemies, could sue as plaintiff. This case was reversed on appeal (*Daimler Co. Ltd. v. Continental Tyre & Rubber Co.* (1916), 2 A. C., 307), considered in this brief, page 49.

Mercedes Daimler Motor Company v. Maudslay Motor Company Ltd. (misdescribed in libelant's brief as *Janson v. Driefontein Consolidated Mines Co. Ltd.*), 31 Times Law Reports, 178, involved a question of suit by an English company against an

English citizen without joining a German who was not a necessary party.

In re Mary, Duchess of Sutherland, 31 Times Law Reports, 248, held that an enemy, if carrying on business in a neutral country, should be treated as a neutral and could sue as a plaintiff in the British courts.

Janson v. Driefontein Consolidated Mines Co., Ltd. (1902), A. C., 484, has been discussed, *supra*, page 47.

Alcinous v. Nigrew, 4 E. & B., 217, held, that debts were suspended during war and that an enemy could not sue in England, so long as the war lasted.

LeBret v. Papillon, 4 East, 502, also held that an enemy could not bring suit in England during the continuance of war.

The Hoop, 1 Chr. Rob., 196, held that trade with an enemy must be suspended during war.

Ex parte Boussmaker, 13 Vesey, Jr., 71, held that a bankruptcy dividend might be declared as to all creditors, but that the payment of a dividend to an enemy who was one of the creditors should be suspended during war.

Albrecht v. Sussman, 2 Ves. & B., 323, has been discussed, *supra*, page 45.

The United States cases. The first of the cases decided by this Court cited by Judge Veeder is *McVeigh v. United States*, referred to *supra*, page 43. The *McVeigh* case was one where the defend-

ant was sued for a wrong committed against the United States during war. For all such wrongs, whether aiding the enemy, running blockade, or any other wrongful act, it is clear that defendant can be prosecuted.

Hanger v. Abbott, 6 Wall., 532. This case is an express authority for the respondent. The plaintiff, a resident of Arkansas, was owed money by the defendant, a resident of New Hampshire, prior to the outbreak of the war. Plaintiff sued for the money after war had been concluded, and the defendant raised the Statute of Limitations as a defense. The Court held this defense invalid, and stated that both the right and the remedy had been suspended during war; the remedy because of the inability of the plaintiff to use the courts during war, and the right because of the general rule that all relations between enemies cease during war. The Court pointed out that enemy nations could confiscate debts, in which case they would not revive, but that the practice to-day is not to confiscate but to allow the debt to be suspended, debts being suspended by the laws of war.

On page 539 the Court said:

"Constant usage and practice of belligerent nations, from the earliest times, subjected enemy's goods in neutral vessels to capture and condemnation as prize of war, but the maxim is now universally acknowledged that 'free ships make free goods,' which is another victory of commerce over the feelings of avarice and revenge. Individual debts, as a general remark, are no longer the subject of confiscation, and the rule is universally admitted that if not confiscated during the war, the return of peace brings with it both 'the right and the remedy.' *Wolff v. Oxholm*, 6 Maule & S., 92."

The Court continued (p. 540) :

"Ability to sue was the *status* of the creditor when the contract was made but the effect of war is to suspend the right, not only without any fault on his part, but under circumstances which make it his duty to abstain from any such attempt. His remedy is suspended by the Acts of the two governments and by the law of nations, not applicable at the date of the contract, but which comes into operation in consequence of an event over which he has no control."

The Court continued (p. 542) :

"Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period."

This case distinctly shows that both the right and the remedy are suspended during war. It related to a debt, as does the case at bar. Since the right as well as the remedy is suspended, no action can be brought here.

The Julia, 8 Cranch., 181, was a prize case. The vessel was condemned for acts hostile to the United States performed during war. There is nothing in the case opposed to the contention of the respondent.

United States v. Lane, 8 Wall., 185, involved the seizure of a vessel for illegal trading during war.

In *Briggs v. United States*, 143 U. S., 346, the action was brought after peace had been declared.

Kershaw v. Kelsey, 100 Mass., 561, was a case begun after the war had ended to enforce rights under a lease.

Griswold v. Waddington, 15 Johns., 57, held that a partnership is suspended during war.

Whelan v. Cook, 29 Md., 1, held that an enemy cannot sue as plaintiff during war.

The number of cases cited by libelant, which do not sustain its contention, shows weakness. Except for cases decided in England since the proclamation of King George was in force, allowing suit against alien enemies, none of the cases hold that debts are not suspended during war, and the cases cited by respondent for that proposition are uncontradicted. The libelant should not be allowed to collect an obligation which is suspended.

SIXTH POINT.

Libelant cannot recover since the drafts were not surrendered.

A. *The original obligation to pay for coal sold and delivered has not been reinstated.* Since an action on a draft would not be a subject of Admiralty jurisdiction, the libelant claims that the acceptance of the drafts was conditional payment only, and cites the case of the *Emily Souder*, 17 Wall, 666, as an authority for the proposition that since the drafts have not been paid, the old obligation to pay for the coal supplied in Algiers has been reinstated. The respondent is not in default. Illegality of an act is a good excuse for its non-performance, and a failure to perform because of the action taken by the British as well as the Austrian authorities, which prevented the branch of the Austrian bank from paying the drafts, is not the kind of failure

of performance contemplated by the parties, which would reinstate the original obligation.

B. *Libelant is not in a situation to sue on the original obligation because the drafts are outstanding.* Moreover, it appears from the stipulation (fol. 40), that only copies of the original drafts were annexed thereto, and that the originals have not been tendered back. Until they are, the original obligation will not be revived. This is well-settled law, and was held in the *Emily Souder*, the case which the libelant cites, in which it was stated that the drafts must be produced on the trial and surrendered for cancellation, or other proof given, that they are no longer in existence. Another leading authority to the same effect decided by this Court, is

Ramsay v. Allegre, 12 Wheat., 611.

That was an action *in personam* against the owner of a vessel, by one who had furnished supplies, and taken a note, which was not paid. The opinion is reported (p. 613) :

"Marshall, *C. J.*, delivered the opinion of the court: that, as it did not appear by the record that the note had been tendered to be given up, or actually surrendered, at the hearing in the court below, the decree would be affirmed, it not being necessary to consider the question of jurisdiction."

It would be a serious injustice to allow suit on the original debt while the drafts are outstanding.

SEVENTH POINT.

Conclusion.

Whether the Court shall or shall not take jurisdiction is a matter of discretion. The District Court and Circuit Court of Appeals have refused to take jurisdiction. The contract was made by foreigners in a foreign land, and was performed in a foreign land. All the witnesses are abroad and the case cannot be justly dealt with here. The difficulties in dealing with the case are increased by a condition of war which makes it not merely inconvenient but absolutely impossible properly to present the facts.

These obvious reasons, which make it impossible for a Court adequately to pass upon questions between belligerents during war, have been crystallized into a rule of law that all intercourse between individuals of the belligerent nations, and debts between them, are suspended during war. Even interest on such debts is suspended during war.

If this Court is to reverse the two lower courts, it will lay down a rule that cases which cannot be disposed of in fairness to the parties in peace time, because of foreign witnesses and foreign law, shall be dealt with in war time when these difficulties are greatly increased.

The libellant also cannot recover because it is suing for coal sold and delivered while drafts given to pay for the coal are still outstanding and may be paid through an English bank.

Now that the United States has gone into the war the libellant seems to think that this Court will give judgment against an Austrian corporation as a matter of course. It assumes that the Court

will hunt it down and take its money, regardless of well established decisions. In the brief, page 54, it is said :

"* * * it will be seen that war does not constitute a closed season for the subjects of our enemies,"

and the libelant concludes :

"Into the scales of justice the sword has now been thrown."

The language suggests the hunting field and that the judgment should be influenced by a spirit of vindictiveness.

This country has entered into war to sustain principles of justice and right dealing, and this Court will never deviate from the high standards for which it is famous throughout the world. As was stated in *McVeigh v. U. S.* (*supra*, pp. 43, 44) :

"A different result would be a blot upon our jurisprudence and civilization."

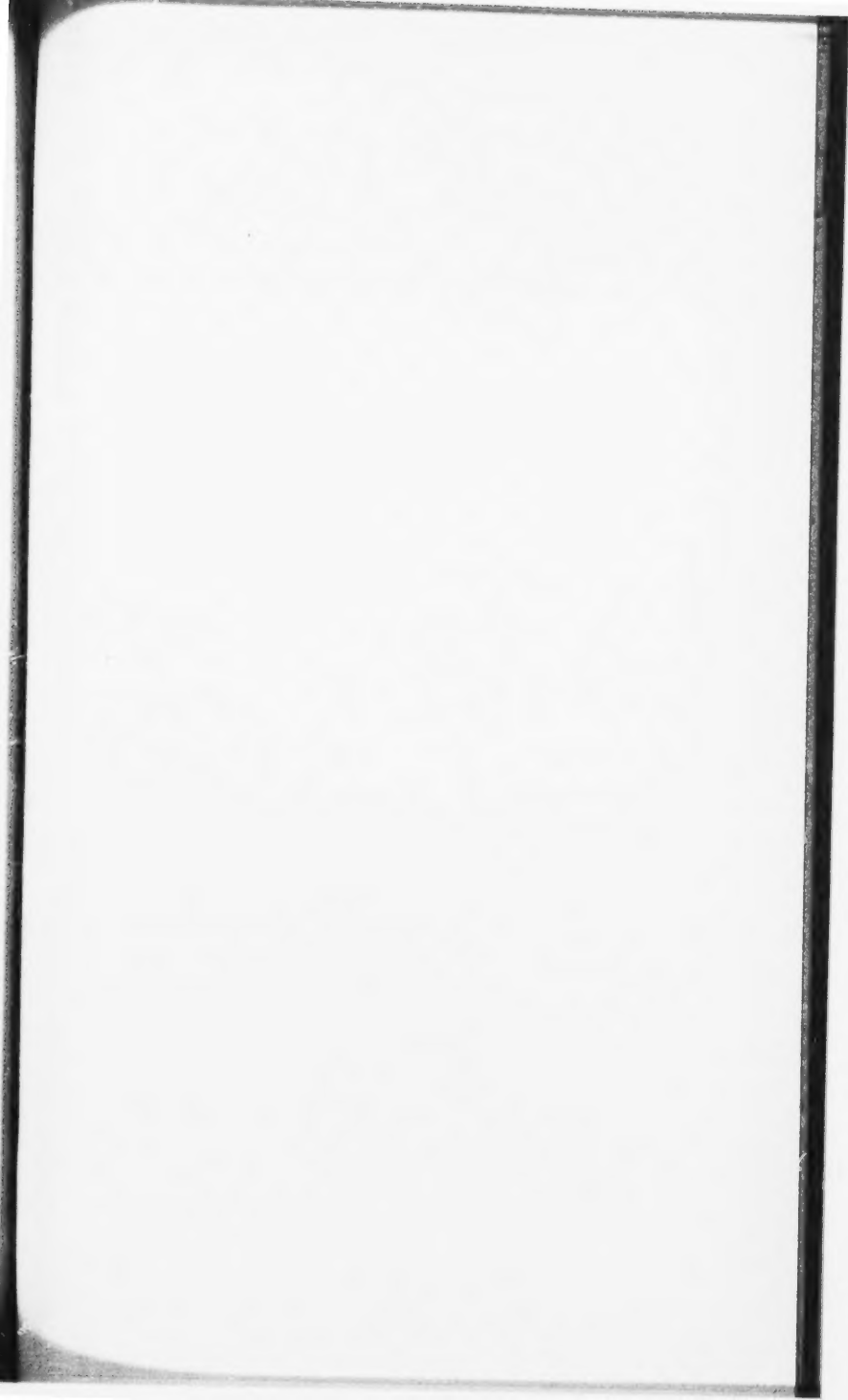
EIGHTH POINT.

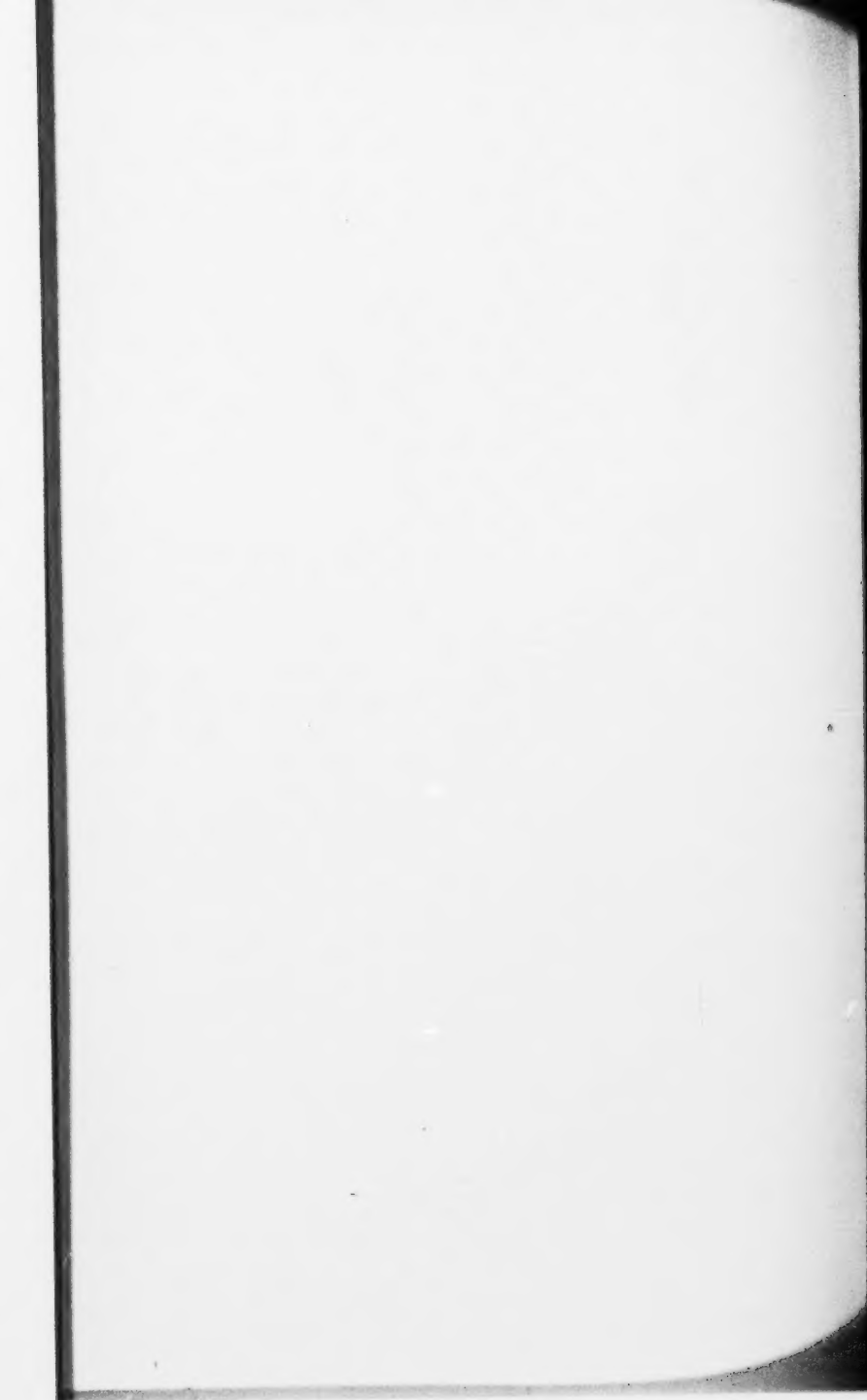
The decree of the Circuit Court of Appeals affirming the decree of the District Court should be affirmed by this Court.

New York, April 4th, 1918.

Respectfully submitted,

CHARLES S. HAIGHT,
CLARENCE BISHOP SMITH,
Counsel for Respondent.





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UNITED STATES SUPREME COURT

October Term, 1916.

No.   25

WATTS, WATTS & COMPANY, LIMITED,

An English Corporation,

Libellant-Petitioner,

against

UNIONE AUSTRIACA DI NAVIGAZIONE, ETC.,

An Austrian Corporation,

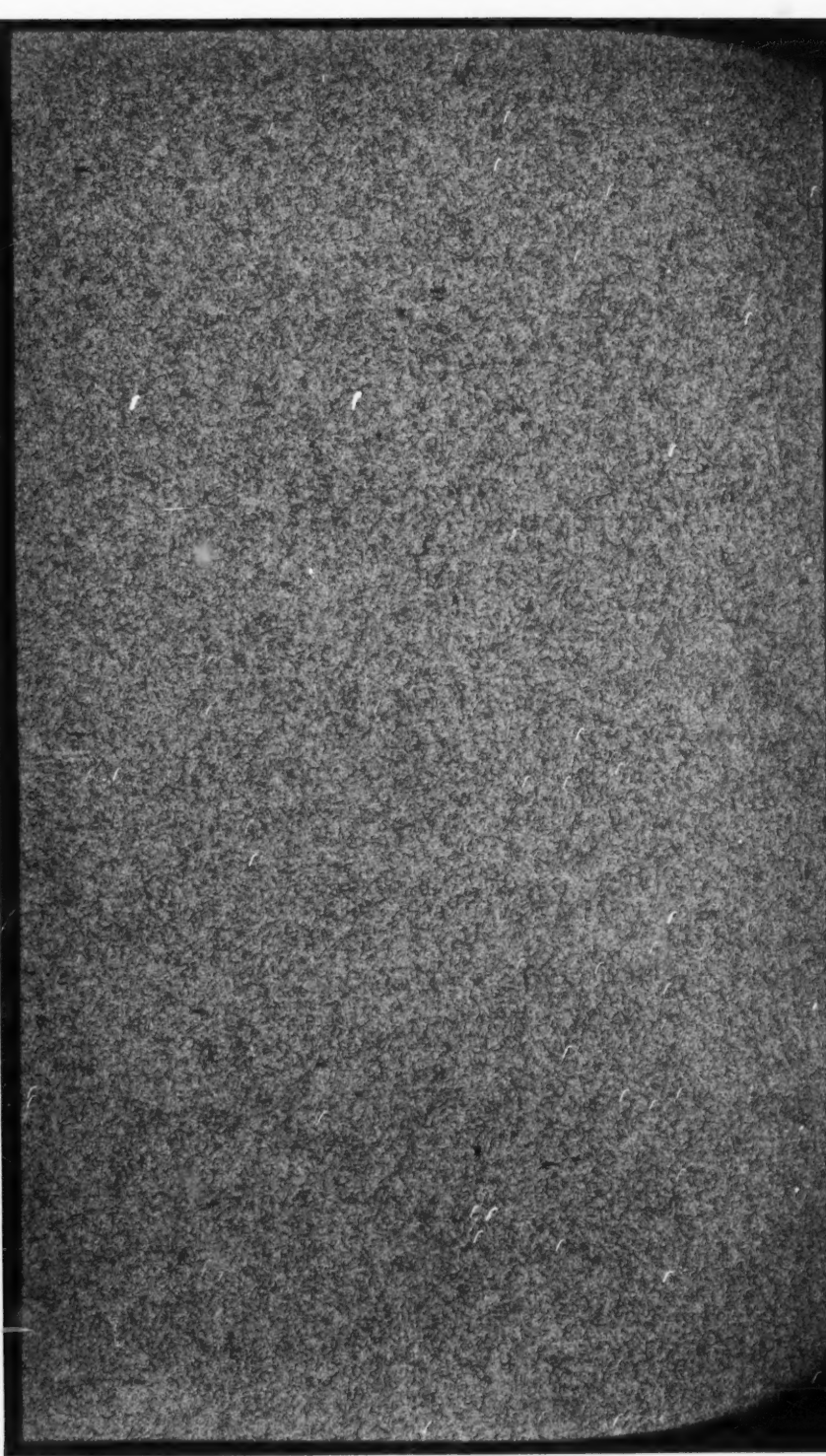
Respondent.

MOTION BY THE PETITIONER TO TRANSFER
CASE FOR HEARING TO THE
SUMMARY DOCKET.

J. PARKER KIRLIN,

JOHN M. WOOLSEY,

Counsel for Petitioner.



UNITED STATES SUPREME COURT.

WATTS, WATTS & COMPANY, LIMITED,
an English corporation,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGAZIONE,
an Austrian corporation,
Respondent.

October Term, 1916.
No. 503.

SIRS:

PLEASE TAKE NOTICE that on Monday, January 15, 1917, at the opening of Court on that day, or so soon thereafter as counsel can be heard, we shall make a motion on the annexed petition before the Supreme Court of the United States that the above-entitled cause be transferred for hearing to the summary docket of this Court on the ground that the case is of such a character as not to justify extended argument, and that we shall then and there ask the Court to grant the petitioner such other or further relief in the premises as may be just.

Dated, New York, December 30, 1916.

Yours, etc.,

KIRLIN, WOOLSEY & HICKOX,

Proctors for Petitioner.

HAIGHT, SANDFORD & SMITH, Esqrs.,

Proctors for Respondent.

UNITED STATES SUPREME COURT.

WATTS, WATTS & COMPANY, LIM-
ITED, an English corporation,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGA-
ZIONE, an Austrian corporation,
Respondent.

October Term, 1916.
No. 503.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

Reported below, 224 Fed. 188 and 229 Fed. 136.

MOTION BY THE PETITIONER TO PLACE THE CASE ON THE
SUMMARY DOCKET.

Now comes Watts, Watts & Company, Ltd., an Eng-
lish corporation, libelant-petitioner, and moves the Court
to place the above-entitled cause on the Summary Docket
for hearing on a day convenient to the Court during the
present term.

1. The petitioner, Watts, Watts & Company, Ltd., an
English corporation, brought a libel against Unione

Austriaca di Navigazione, an Austrian corporation, in the United States District Court for the Eastern District of New York, to recover the sum of \$45,360, the agreed and reasonable price of bunker coals furnished by the libellant to the respondent's steamers at Algiers, a dependency of the French Republic, before the outbreak of war between England and Austria. *Libel, Fols. 5-11.*

Jurisdiction of the respondent, Unione Austriaca di Navigazione, was obtained by writ of foreign attachment against the respondent's steamer *Martha Washington*.

The respondent appeared generally and filed an answer to the libel.

Article Fifth of the answer admits the allegation of the libel that the premises of the libel are within the Admiralty and Maritime jurisdiction of the United States and of the District Court for the Eastern District of New York. *Fols. 10, 11; 23, 24.*

The answer contained the following unusual form of prayer:

"WHEREFORE, respondent prays that judgment be rendered in the premises in accordance with the allegations and proofs which shall be submitted by libellant, and in default thereof that the libel be dismissed with costs." *Fol. 24.*

A stipulation dealing with the facts of the case and providing for the proof of foreign law was agreed on between the parties and such law was proved thereunder. *Fols. 29 and 70; pages 8 to 18.*

In order that this Court may have before it, in convenient form on this motion copies of all the papers on which the case is based, namely, the libel, the answer, and the stipulation of facts, and proof of foreign law, omitting the exhibits, are hereto annexed and made part of this petition as Schedules "A", "B" and "C" hereof.

The whole case is contained in these papers, and the relevant laws and proclamations of England and Austria are annexed to the stipulation of facts and printed in full in the Transcript of Record.

These documents, it is submitted, illustrate how narrowly defined the questions of law arising in this suit are.

2. The respondent admitted its liability for the payment of the amount sued for in the libel in a letter addressed by it to the libelant dated September 19, 1914. In that letter it writes as follows, *fols.* 348-349:

"We have accepted several drafts for Bunker Coal supplied to our ships, which, failing advice from our London Bankers, seem not to have been paid up to now. The whole amount of the drafts accepted with payment due up to September 29th, 1914, is:

"Lst. 8,641.9.9.

"Of course, it goes without saying, that we wish to confirm our liabilities for the payment of these amounts.

"The legal dispositions taken by the British and Austrian Government (Moratoria) prevent us, however, to fulfill our original undertaking."

This suit was for coal sold and delivered. The drafts on London referred to in the Stipulation of Facts and mentioned by the respondent in its letter of September 19, 1914, were not honored, *Fols.* 65-66. They may be disregarded in the present proceeding, except insofar as they constitute admissions, in addition to the letter mentioned, of the indebtedness of the respondent, for, as both the District Judge and the Court of Appeals found, the suit was founded on the original debt. *Fols.* 378, 429; 224 Fed. at 190, 229 Fed. at 137.

The situation, therefore, is that the libelant-petitioner is here with a claim in respect of which the respondent in its sworn answer has admitted the Court's jurisdiction, and which the drafts and the respondent's letter to the libelant show to be due.

The defense of the respondent to the payment of the claim is founded on the fact that the ordinances and laws of the Austrian-Hungarian Empire forbid the payment by Austrian subjects to enemy subjects of any money during the existence of war. These ordinances were annexed to the Stipulation of Facts and are printed in full in the Record. Pages 80-87.

The District Judge in dismissing the libel summarized his attitude towards the case as follows, 224 Fed. at page 194:

“From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries forbids a payment by one belligerent

erent subject to his enemy during the continuance of war. This court in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it." Record, *Fol.* 403.

As a consequence of this opinion the libel was ordered dismissed without prejudice, and a decree entered accordingly. *Fols.* 404-408.

On appeal by the libelant, the Circuit Court of Appeals failed to decide the question submitted to it but affirmed the decision of the District Court in a *per curiam* opinion, *fols.* 427-431, 229 Fed. 136, in which, after shortly stating the circumstances under which the case arose and mentioning the fact that a war between England and Austria was in progress, it said:

"The libelant filed a libel *in personam* against the respondent, not upon the drafts, but to recover for the debt, and attached the steamer *Martha Washington*. *The respondent does not deny its obligation to pay.* [Italics are ours.]

"Judge Veeder in the District Court, feeling that it was inexpedient under these circumstances to take jurisdiction of the controversy, dismissed the libel without prejudice. Whether to take or to decline jurisdiction was a matter within his discretion, see *The Belgenland*, 114 U. S. 355; *Benedict on Admiralty*, Sec. 195, and as no abuse of discretion appears, the decree is affirmed."

There was not any question of discretion raised by the District Judge. He took jurisdiction of the case but re-

fused, on grounds of comity, to allow a recovery by the libellant. 224 Fed. 191, 194.

There is not any question of fact involved, the sole questions before this Court are narrowly defined questions of law.

QUESTIONS OF LAW INVOLVED.

The principal question of law involved is simple. It is:

Whether or not a British subject is entitled to maintain against an Austrian subject in the courts of the United States an action for the purchase price of coals furnished to Austrian steamers plying between Trieste and the United States before the war between Austria and Great Britain was declared, in a case where the Austrian subject has entered a general appearance, admitted that the claim is just and valid, and placed its sole defense to the payment of the claim on the Austrian prohibition against paying money to or trading with the enemy.

Subsidiary questions involved are:

1. Whether it is a breach of comity for the courts of the United States to exercise jurisdiction in actions between subjects of Nations now at war with each other.

2. Whether, when a court has assumed jurisdiction of a case which is within its jurisdiction it can refuse to decide the case in accordance with the admissions con-

tained in the pleadings and proofs, and instead of so doing enforce the penal statutes of a foreign country as a defense to a claim which the court itself admits to be due and recoverable except for those statutes.

REASONS FOR PLACING THE CASE ON THE SUMMARY DOCKET.

The reasons for placing the case on the Summary Docket are as follows:

1. Although the case involves questions of novelty and importance in the domain of private international law, the questions of law involved are short and narrowly defined and there is not any extended list of authorities to be discussed or considered by this Court.

The petitioner, which is in the position of appellant before this court, and as such incurs any risk involved in too brief an argument, submits that it would be wholly unnecessary for counsel to devote any more time to the argument of this case before this court than is given under the rules to cases on the Summary Docket.

2. Since the decision of the present case, there have been decisions both ways on the questions involved.

A decision has been rendered by a Vice Chancellor of the State of New Jersey, in which Judge Veeder's decision has been strongly disapproved and solid ground stated for the application of the rule that in cases like this, neutral courts should grant appropriate relief.

Compagnie Universelle de Telegraphie et de Telephonie

Sans Fil v. United States Service Corporation, et al., 95 Atlantic Reporter 187.

A decision has been rendered by Judge Haight of the United States District Court for the District of New Jersey, in which Judge Veeder's ruling has been followed. *The Kaiser Wilhelm II*, 230 Fed. 717.

3. Other cases and controversies are pending in which the same question is involved, which cannot be concluded until after the end of the war unless there is a decision of the principal question here involved by this Court.

It is submitted, therefore, that this case can be fully argued if placed on the Summary Docket, and that it is of importance that there should be an early decision by this Court of the simple questions involved in order that the determination of pending cases, which involve similar questions, may be facilitated and made uniform.

Respectfully submitted,

WATTS, WATTS & COMPANY, LTD.,
Petitioner.

By KIRLIN, WOOLSEY & HICKOX,
Proctors for Petitioner.

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
Counsel for Petitioner.

STATE OF NEW YORK, {
County of New York. } ss.:

JOHN M. WOOLSEY, being duly sworn, says:

I am a member of the firm of Kirlin, Woolsey & Hickox, duly substituted for Convers & Kirlin, as procutors for the petitioner herein.

I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

The reason why this verification is not made by the petitioner is that it is a foreign corporation, and the reason that it is not made by one of its officers is that none of them is within the United States.

This application is made in good faith.

JOHN M. WOOLSEY.

Sworn to before me, this {
 30th day of December, 1916. }

CLETUS KEATING,

Notary Public,

New York County, No. 33.

I DO HEREBY CERTIFY that I have examined the foregoing petition and that, in my opinion, it is well founded and entitled to the favorable consideration of this Court.

J. PARKER KIRLIN.

SCHEDULE A.**Libel.**

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK :

The libel of Watts, Watts & Company, Limited, against Unione Austriaca di Navigacion, in a cause of contract, civil and maritime, alleges :

FIRST: The libelant, Watts, Watts & Company, Limited, is a corporation organized and existing under the laws of Great Britain and Ireland, with agents in London, New York and other ports, and is engaged, among other things, in the business of furnishing coal to steamships. The respondent, Unione Austriaca di Navigacion, is a corporation organized under the laws of the Empire of Austria-Hungary, and is the owner of a large number of steamships which, prior to the outbreak of the present war, were engaged in navigation to and from New York and other ports and places.

SECOND: On or about November 19, 1913, a contract in writing was entered into between the libelant and the respondent for the furnishing by the libelant of bunker coal to the steamers of the respondent on agreed terms and conditions.

THIRD: Prior to the date of the filing of this libel, the libelant, at the instance and request of the respond-

ent, furnished to the steamers of the respondent, in accordance with the provisions of said contract, bunker coals of the reasonable and agreed value of £9,000, equivalent in currency of the United States at the current rate of exchange of \$5.04 to \$45,360.00, for which respondent has not made payment to the libelant as provided for in the said contract although the said amount is now due. Demand has been made for payment in respect of the said coals, but no part of the said indebtedness has been discharged.

FOURTH: The respondent, Unione Austriaca di Navigacion, is a foreign corporation, and, as libelant is informed and believes, none of its officers or directors resides or is within this district. Said respondent, however, has certain property within the district, to wit, the Austrian steamship *Martha Washington*, her engines, boilers, tackle, apparel and furniture, of which the respondent, Unione Austriaca di Navigacion, is sole owner.

FIFTH: *All and singular the premises of this libel are true and within the admiralty and maritime jurisdiction of this Honorable Court.* [Italics ours.]

WHEREFORE, the libelant prays that process may issue, with clause of foreign attachment, against the respondent, Unione Austriaca di Navigacion, citing it to appear and answer in the premises, and further com-

manding the Marshal of this district, in case the said respondent cannot be found within the district, that property of the respondent within this jurisdiction, consisting of the steamship *Martha Washington*, be attached, and that a decree may be entered herein in favor of the libelant against the respondent for the sum of \$45,360.00, with interest and costs, or that the Court will grant to the libelant such other or further relief as the justice of the cause may require.

CONVERS & KIRLIN,
Proctors for Libelant,

STATE OF NEW YORK, }
County of New York, } ss.:

JOHN M. WOOLSEY, being duly sworn, says: I am a member of the firm of Convers & Kirlin, proctors for the libelant herein. That the foregoing libel is true of my own knowledge, except as to the matters stated to be alleged on information and belief, and as to those matters I believe it to be true.

The sources of my information and the reasons for my belief as to the matters not within my own knowledge are correspondence had with the representatives of the libelant.

The reason this verification is not made by the libelant is that it is a foreign corporation, and the reason that it

is not made by one of its officers is that none of them is within the United States.

JOHN M. WOOLSEY.

Sworn to before me this)
25th day of August, 1914. (

L. DE GROVE POTTER,
Notary Public,

Westchester County Certificate filed in
New York County No.

Register Number .

SCHEDULE B.**Answer.**

To the Honorable THE JUDGES of the District Court of the United States for the Eastern District of New York.

The Answer of the UNIONE AUSTRICA DI NAVIGATION, to the libel of WATTS, WATTS & COMPANY, LTD., in a cause of contract, civil and maritime, alleges as follows:

FIRST.—The respondent has no sufficient knowledge that the libelant is a corporation organized and existing under the Laws of Great Britain and Ireland, with agents in London, New York and other Ports, or that as such it is engaged, among other things, in the business of furnishing coal to Steamships, and leaves the libelant to its proof therefor.

The respondent admits that the Unione Austriaca di Navigation is a corporation organized under the laws of the Empire of Austria-Hungary and is the owner of a large number of Steamships, which prior to the outbreak of the present War were engaged in navigation to and from New York and from other Ports and places.

SECOND.—Respondent admits that on or about November 19th, 1903, a contract in writing was entered into between Libelant and the Respondent for the furnishing by the Libelant of bunker coal to Steamships of the Respondent on agreed terms and conditions, but as

to the terms and conditions therein contained, the respondent makes reference to the said contract and leaves libelant to prove the same.

THIRD.—Respondent has no knowledge, sufficient to form a belief, that prior to the date of the filing of the said libel, the libelant furnished to the Steamers of the Respondent, in accordance with the provisions of said contract, bunker coal at the agreed price and reasonable value of £9,000, equivalent in currency of the United States at the current rate of exchange of \$5.04 to \$45,360.00, and respondent leaves the libelant to make proof sustaining the said allegation contained in the "Third" paragraph of its said libel.

Respondent further answering, denies that payment to the libelant as provided for in said contract was demanded of the respondent, and that the respondent thereupon refused to make payment of the sums so due as provided for in the said contract.

FOURTH.—Respondent admits that UNIONE AUSTRICA DI NAVIGATION, is a foreign corporation and none of its officers or directors reside or is now within this district but as to whether the allegations made in the "Fourth" paragraph of said libel, the respondent leaves libelant to his proofs to sustain the same.

FIFTH.—*Respondent admits that all and singular the premises of this libel are within the Admiralty and maritime jurisdiction of this honorable Court. [Italics ours.]*

WHEREFORE, respondent prays that judgment be rendered in the premises in accordance with the allegations and proofs which shall be submitted by libelant, and in default thereof that the said libel be dismissed with costs.

LORENZO ULLO,
Proctor for Respondent.

STATE OF NEW YORK, }
City of New York, } ss.:
County of New York, }

LORENZO ULLO, being duly sworn, says: I am the proctor for the respondents herein. I have read the foregoing Answer and know the contents thereof, and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and information are communications received from the attorneys of the respondent. The reason why this verification is not made by the respondent is that the respondent is a foreign corporation.

LORENZO ULLO.

Sworn to before me this }
11th day of September, 1914. }

JAMES A. BEHA,
Notary Public,

(L. S.) N. Y. Co.

SCHEDULE C.**Stipulation of Facts.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

WATTS, WATTS & COMPANY, LTD.,

Libelant,

against

UNIONE AUSTRIACA DI NAVIGAZIONE,

Respondent.

Stipulation
as to Facts
and Proof of
Foreign Law.

IT IS STIPULATED AND AGREED by and between the proctors for the respective parties that the facts in the above case are as follows:

1. The libelant, Watts, Watts & Company, Limited, is a corporation organized and existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, with its principal offices in the City of London.

2. The Unione Austriaca di Navigazione, whose full title is, "Unione Austriaca di Navigazione gia Austro-Americana e Fratelli Gosulich—Societa Anonima," is a corporation existing under and by virtue of the laws of the Austro-Hungarian Empire, with its principal offices at Trieste, and owns and operates a large fleet of steamers in the Mediterranean and Transatlantic Trades.

3. Messrs. Fratelli Gosulich are the managing directors of the said Unione Austriaca di Navigazione and, as

such, duly authorized to make contracts for the said company and to acknowledge the indebtedness thereof.

4. On or about November 19th, 1913, a contract in writing was entered into by and between the respondent acting through Messrs. Fratelli Gosulich of Trieste, who are subjects of the Austro-Hungarian Empire, and Watts, Watts & Company, Ltd., the libelant herein. A copy of this contract as signed and executed is hereto annexed marked Exhibit 1, and hereby made part of this stipulation.

5. Coal was furnished at Algiers to the following steamers of the respondent by Messrs. Watts, Watts & Company, Ltd., under and in pursuance of the said contract as follows:

<i>Date</i>	<i>Steamship</i>	<i>No. of Tons</i>	<i>Amount</i>
1914			
May 29	Martha Washington.	606	£734:15:6
June 1	Kaiser Franz Josef I.	781	946:19:3
June 3	Anna,	112	135: 6:0
June 5	Oceania,	572	620:16:0
June 9	The Gerty.	192	232:16:0
June 15	Argentina,	290	351:12:6
June 18	Kaiser Franz Josef I.	992	1202:16:0
" 23	Campania,	140	169:15:0
June 26	Belvedere,	399	423: 3:3
" 28	Martha Washington.		972: 8:6
July 3	Argentina,	478	579:11:6
" 6	Oceania,	463	561: 7:9
" 13	Kaiser Franz Josef I.	803	973:12:9
" 23	Martha Washington.	607	735:19:9
			<hr/> £8641: 9:9

6. In consequence of the coal so furnished to said steamers, and in pursuance of the said contract, the captains of the several steamers drew drafts in Sterling on

the owners of said steamers at sixty days' sight, payable in London, England, for the price of the said coal.

The drafts were duly accepted by the owners of said steamers as payable at Kais. Koen. Priv. Oesterreichische Laenderbank, in London, a bank duly established and doing business in London, England, and thereafter libellant caused them to be duly presented for payment there but for reasons hereafter stated, they were not paid by the said Kais. Koen. Priv. Oesterreichische Laenderbank on the days when they were due and thereupon they were duly protested and are still unpaid.

The dates of these drafts, the names of the steamers for whose bunkers they were drawn, their due dates and amounts which have been paid by the libellant for the protest of the drafts are as follows:

<i>Drawn</i> 1914	<i>Vessel</i>	<i>Due</i>	<i>Amount</i>	<i>Expense</i> <i>Protest</i>
May 29	Martha Washington	Aug. 7/14	£734:15:6	11.6
June 1	Kaiser Franz Josef I	" 11/14	946:19:3	11.6
" 3	Anna	" 11/14	135:16:0	9.0
" 5	Oceania	" 17/14	620:16:0	14.0
" 9	Gerty	" 18/14	232:16:0	9.0
" 15	Argentina	" 22/14	351:12:6	11.0
" 18	Kaiser Franz Josef I	" 27/14	1202:16:0	14.0
" 23	Campania	Sept. 1/14	169:15:0	11.6
" 26	Belvedere	" 4/14	423: 3:3	11.6
" 28	Martha Washington	" 4/14	972: 8:6	14.0
July 3	Argentina	" 12/14	579:11:6	14.0
" 6	Oceania	" 12/14	561: 7:9	14.0
" 13	Kaiser Franz Josef I	" 22/14	973:12:9	14.0
" 23	Martha Washington	Oct. 1/14	735:19:9	11.8
			8641: 9:9	£8: 3:6
				8641: 9:9
				8649:13.3

Copies of the original drafts with protests are hereto annexed marked Exhibits 2 to 15, inclusive, and are hereby made part of this stipulation.

7. On August 4th, at 11 p.m., Great Britain declared war against Germany, and on August 12, 1914, Great Britain declared that a state of war had existed between Great Britain and the Austro-Hungarian Empire as from midnight.

8. After these declarations of war proclamations were issued by the King of Great Britain and Ireland in Council on August 5th, August 12th and on September 9th, 1914, as to trading with the enemy. A copy of such proclamations is hereto annexed and are hereby made part of this stipulation, as Exhibits 17, 18, 19 hereof.

The British Parliament also passed an act entitled "Trading with the Enemy Act, 1914," copy of which is hereto annexed, marked Exhibit 20.

9. The Kais. Koen. Priv. Oesterreichische is a banking institution organized under the laws of Austria, which at the outbreak of war had a duly established branch, established and doing business in London. After the outbreak of war and as a war measure and on or about August 13, 1914, Sir William Plender, the person referred to in certain of the protests attached to the drafts, was appointed Comptroller of the London branch of said bank in pursuance of Section 3 of the Trading with the Enemy Act. The following is an extract from

London Daily Telegraph, Sept. 30, 1914, showing the circumstances of his appointment:

German and Austrian Banks
(London Telegraph, Sept. 30, 1914.)

Amended Licenses.

The Deutsche Bank, the Dresdner Bank, the Direction der Disconto-Gesellschaft, the Austrian Laender Bank, and the Anglo-Austrian Bank, announce that they have received from the British Government an amended license, of which the following is a copy:

In pursuance of the powers conferred in me by the Aliens' Restriction (No. 2) Order in council, 1914, made on the 10th day of August, under the Aliens' Restriction Act, 1914, I hereby permit the Deutsche Bank, the Dresdner Bank, the Disconto-Gesellschaft, the Austrian Laender Bank and the Anglo-Austrian Bank, to carry on banking business in the United Kingdom, subject to the following limitations, conditions, supervisions, and requirements, as to the deposit of money and securities:

1. The permission shall extend only to the completion of the transactions of a banking character entered into before the 5th day of August, 1914, so far as those transactions would, in ordinary course, have been carried out through or with the London establishments.

The permission does not extend to any operations for the purpose of making available assets which would ordi-

narily be collected by or of discharging liabilities, which would ordinarily be discharged by, establishments of the banks other than the London establishments.

No new transaction of any kind, save as may be necessary or desirable for the purpose of the completion of the first mentioned transactions, shall be entered into by or on behalf of the London establishments of the banks.

2. The business to be transacted under this permission shall be limited to such operations as may be necessary for making the realizable assets of the banks available for meeting their liabilities, and for discharging these liabilities as far as may be practicable.

3. All transactions carried out under this permission shall be subject to the supervision and control of a person to be appointed for the purpose by the Treasury, who shall have absolute discretion:

a. To refuse to permit any payments that may appear to him to be contrary to the interest of the nation;

b. To permit any such new transactions as are in his opinion necessary or desirable for the purpose of the completion of the transactions first mentioned in paragraph 1;

c. To permit or to refuse to permit the completion of any particular transaction whatsoever.

4. Any assets of the banks which may remain undisturbed after their liabilities have, so far as possible in the circumstances, been discharged, shall be deposited with the Bank of England, to the order of the Treasury.

The permission granted by me on the 10th day of August, 1914, is hereby revoked.

(Signed) R. McKenna.

One of His Majesty's Principal Secretaries of State.

Home Office, Whitehall, September 19th, 1914.

*Statement by Sir W. Plender
Range of Liabilities*

Sir William Plender, the Comptroller appointed by the Treasury, has issued the following statement:

On August 10th, 1914, licenses were issued by the Home Secretary to the British establishments of the Deutsche Bank, the Dresdner Bank, and the Direction der Disconto-Gesellschaft, and on August 13th, 1914, licenses were also issued to the British establishments of the Austrian Laender Bank and the Anglo Austrian Bank, for carrying on banking business in this country, subject to certain restrictions specified in the licenses.

Owing to the form of such licenses, doubt has arisen as to the range of the liabilities of the British establishments of the banks, and the Home Secretary, as a result, has caused amending licenses to be issued to each of the banks, dated September 19th, 1914, the effect of which is that no liabilities will be recognized by the London branches of the banks except such as in the opinion of the comptroller arise out of transactions which have been entered into by or on behalf of these branches.

This excludes also liabilities which originated with or arise out of transactions with the head offices or their branches, which are not liabilities of the London branches.

The comptroller has absolute discretion to refuse to admit any payment which may appear to him to be contrary to the interest of the Nation; to permit any such new transactions as are in his opinion necessary or desirable for the purpose of the completion of transactions referred to in paragraph 1 of the license; and to permit or to refuse to permit the completion of any particular transaction whatsoever.

The full text of the license is published, dated, and the business to be transacted under them is limited to such operations as may be necessary for making the realizable assets of the banks available for meeting their liabilities, and for discharging its liabilities as far as may be practicable.

Difficulties in the Way.

The resumption of business, though limited to the completion of transactions entered into before the declaration of war, presents many difficulties.

In some of the banks the assets not collected would appear to be approximately sufficient to meet the liabilities to be discharged under the terms of the amended licenses above referred to.

But immediate payment in full of liabilities which have actually matured, might bear harshly against other

creditors whose claims are not yet payable, and the obstacles in collecting money from foreign countries might, and probably would, delay settlement with such other countries.

Uniformity in treatment is essential. In the case of certain of the banks there is a shortage between the assets which are available here for collection and the liabilities by reason of the fact that head office is a debtor to London.

This does not imply that creditors may not receive payment in full at a future time, as the head office would, after the declaration of peace, remain answerable for liabilities which were not capable of being discharged out of the assets under the immediate control of the London establishments.

Distribution on Account Under Consideration.

The question of making a distribution on account (other than to alien) is receiving very serious consideration, and all efforts are being concentrated to secure its accomplishment.

The proportion of assets to liabilities differs in the case of each bank, and distributions when made cannot be on the same scale.

The difficulties in securing collections are mainly due to the fact that debts due to the banks from persons and institutions in neutral countries on the continent and in North and South America, are not capable of speedy real-

ization, because of the moratorium which exists in many of these countries, and also on account of the interruptions (now being remedied) in the foreign exchange; securities are not readily marketable, and loans have not been repaid, as the borrowers in many cases plead the moratorium.

Holders of cheques issued by customers of the banks and holders of domiciled bills accepted by customers, cannot be regarded as creditors.

10. Thereafter the Austrian Emperor on October 18, 1914, and the Joint Ministries of the Austro-Hungarian Empire on October 22nd, 1914, issued certain orders and proclamations, in pursuance of the authority in them duly vested, dealing with "*Measures of Reprisals on Properties and Claims of Hostile States*" and "*Regarding Prohibition of Payments to England and France*" and other cognate matters. Correct translations of these orders and proclamations being Nos. 289, 290, 291 and 292, as published in the "*Bulletin of Imperial Laws for the Kingdom and Lands in the Council of the Empire*" are hereto annexed as Exhibits 21, 22, 23, 24, and hereby made part hereof.

11. Owing to the aforesaid orders and proclamations of the duly constituted Governments, the said Kais. Koen. Priv. Oesterreichische Laenderbank have not paid to libellant said drafts so accepted as aforesaid, although in the usual course of business the respondent would have provided the said Kais. Koen. Priv. Oesterreichische

Laenderbank with necessary and sufficient means for the due payment of said drafts on the respective days when due.

The respondent addressed a letter under date of September 19, 1914, to Messrs. Watts, Watts & Company, Ltd., the libelant herein, at London, a copy of which is hereto annexed marked Exhibit 25 and is hereby made part hereof.

12. By reason of the proclamations in force within the jurisdiction of the said Belligerent Powers hereinbefore referred to and of others which may hereafter be referred to, the above-mentioned drafts amounting to the sum of £8641:9:9, and the above-mentioned sum of £8:3:6, amounting in all to £8641:13:3, with interest thereon from the due dates of the several drafts still remain unpaid notwithstanding that respondent herein has been at all times ready, able and willing to pay the same.

13. Either party may read as evidence in the case subject to correction and without formal proof, any Statute, Proclamation or Order in Council of the Lawful Government of the British Empire or of the Austro-Hungarian Empire, or any published Decision of a Court of Record of either of the said Governments. In the case of Proclamations or Orders in Council, the text to be taken as authentic for the Government of the British Empire, shall be the text as officially promulgated in the London Gazette, and for the Austro-Hungarian Empire

the text as officially promulgated in the Bulletin of the Imperial Laws.

In the case of Statutes of Great Britain, the text to be taken as authentic shall be either that published by the official law reporting association, known as "Published General Statutes," or else those published by the Law Journal known as "Statutes of the Realm."

March 16, 1915.

CONVERS & KIRLIN,

Proctors for Libelant.

LORENZO ULLO,

Proctor for Respondent.

NO. 5 1917
JAMES A. HANER
CLERK
UNITED STATES SUPREME COURT

October Term, 1946

No. 145

25

WATTS, WATTS & COMPANY, LIMITED

An English Corporation

Plaintiffs

vs.

UNIONE AUSTRIACA DI NAVIGAZIONE, Snc

An American Corporation

Respondent

MEMORANDUM FOR RESPONDENT IN OPPO-
SITION TO MOTION TO PLACE THE CASE
UPON THE SUMMARY DOCKET

CHARLES S. HANFT

Counsel for the Respondent

UNITED STATES SUPREME COURT.

WATTS, WATTS & COMPANY, LIM-
ITED, an English corporation,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGA-
ZIONE, an Austrian corporation,
Respondent.

October Term, 1916.
No. 503.

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO MOTION
TO PLACE THE CASE UPON THE SUMMARY DOCKET.

The motion to place this case upon the Summary Docket follows a motion, denied on December 4, 1916, to advance the case for an early hearing. The motion to advance was not opposed, counsel for the respondent merely explaining the nature of the case and asking to be allowed sufficient time in which to make adequate preparation, if this Court considered that the case was one which should be advanced. The present motion, however, is opposed.

According to the rules of this Court, cases are placed upon the Summary Docket which are "of such a character as not to justify extended argument", and upon

the argument of cases on that docket only one-half hour is allowed to each side.

In the present motion it is urged by counsel for the petitioner that "the questions of law involved are short and narrowly defined and there is not any extended list of authorities to be discussed or considered by this Court." It is submitted, however, that the importance of the case was more accurately stated by counsel for the petitioner, when this Court was requested to advance the case for an early hearing. The reasons for that application, as stated in the previous motion papers were as follows:

"1. The case involves questions of gravity, novelty and importance in our general jurisprudence as well as in the domain of private international law.

2. There had not been, before the decision of this case, any reported case in the courts of any nation in which the question of the right of the subject of a belligerent nation to bring suit against the subject of an enemy nation in a neutral court had been raised.

3. There are now pending in several of the District Courts of the United States and in the Courts of several different States many cases involving, as this case does, the question of the right of a subject of a belligerent nation to bring suit against the subject of an enemy nation in a court of a neutral country.

4. Since the decision of the present case, there have been rulings both ways on the question. * * *

5. The divergent views expressed by the Equity Court in New Jersey and the United States District Courts indicate that as more cases involving the

question in this case come to be decided by the Courts, there will be further conflict of opinion.

6. Furthermore, it is certain that more cases of this kind will arise in view of the continuance of the present European war; and, consequently, to have a pronouncement by this Court as to the proper disposition to be made of suits by a subject of a belligerent nation against a subject of an enemy nation is of such public importance as to justify the advancement of the case for an early hearing on some day convenient to the Court during the present term."

It is submitted that a case which justified the statements quoted above cannot, with propriety, be ordered upon the Summary Docket, to be disposed of in a summary way.

If this Court should reverse the Circuit Court of Appeals, it will mean that, wherever property can be attached, the Federal Courts of this country must try any and every claim held by a citizen of one of the belligerent nations of Europe against a citizen of an hostile nation, no matter where the contract was made, where it was to be performed, or what law governs it, and regardless of the fact that all belligerent nations have passed "Trading with the Enemy Acts", which prohibit their citizens from dealing with, or paying money to, an enemy subject, so long as the war lasts. It would be hard to imagine a case which will be more far-reaching in its results, or which will be of so much importance to foreign countries, and it is wholly inappropriate for counsel for the petitioner to suggest that the case does not justify

the most careful argument and consideration. Upon the argument of the case in the Court below, full time was taken by both sides and the case certainly cannot be adequately presented to this Court in one-quarter of the time normally allowed.

The statement is several times repeated in the motion papers that the respondent admitted the jurisdiction of the Trial Court. As a matter of fact, the respondent from the outset, while admitting that the United States District Court *could* take jurisdiction of the case, has consistently urged that it was appropriate for it to refuse to do so. The Trial Judge never in fact "assumed jurisdiction" of the case, but simply considered the question as to whether or not it would be wise to do so, and, in his discretion, decided in the negative. The Circuit Court of Appeals, in turn, held that the Trial Judge had the right to exercise his discretion as to whether or not jurisdiction should be assumed, and that there was no occasion to set aside his decision after that discretion had been exercised.

The purpose of the present motion, obviously, is simply to obtain a hearing of the case out of turn. It is sufficient to say, as to that, that the motion to advance was denied.

Respectfully submitted,

CHARLES S. HAIGHT,
Counsel for the Respondent.

Jurisdiction of the respondent, Unione Austriaca di Navigazione, was obtained by writ of foreign attachment against the respondent's steamer *Martha Washington*. This attachment has not yet been vacated by the filing of a bond and the steamer is still lying at New York, subject to said writ.

The respondent appeared generally and filed an answer to the libel.

Article Fifth of the answer admits the allegation of the libel that the premises of the libel are within the Admiralty and Maritime jurisdiction of the United States and of the District Court for the Eastern District of New York. *Fols.* 10-11; 23-24.

The answer contained the following unusual form of prayer:

"WHEREFORE, respondent prays that judgment be rendered in the premises in accordance with the allegations and proofs which shall be submitted by libelant, and in default thereof that the libel be dismissed with costs." *Fol.* 24.

A stipulation dealing with the facts of the case and providing for the proof of foreign law was agreed on between the parties. *Fols.* 29-70. *Pages* 8 to 18.

The respondent admitted its liability for the payment of the amount sued for in the libel in a letter addressed by it to the libelant dated September 19, 1914. In that letter it writes as follows:

"We have accepted several drafts for Bunker Coal supplied to our ships, which, failing advice from our London Bankers, seem not to have been paid up to now. The whole amount of the drafts

accepted with payment due up to September 29th, 1914, is:

"Lst. 8,641.9.9.

"Of course, it goes without saying, that we wish to confirm our liabilities for the payment of these amounts.

"The legal dispositions taken by the British and Austrian Government (Moratoria) prevent us, however, to fulfill our original undertaking." *Fols. 348-349.*

The suit was brought for the purchase price of coal sold and delivered to the respondent.

The drafts on London referred to by the respondent in its letter of September 19, 1914, were not honored, fols. 65-66, and may be disregarded in the present proceeding, except insofar as they constitute admissions, in addition to the letter mentioned, of the indebtedness of the respondent, for, as the District Judge found, the suit was founded on the original debt. *Fol. 378.*

The situation, therefore, is that the libellant-petitioner is here with a claim for the agreed value of goods sold to the respondent in respect of which the respondent in its sworn answer has admitted the Court's jurisdiction, and for which the stipulated proofs show payment to be admittedly due.

The defense of the respondent to the payment of the claim is founded on the fact that the ordinances and laws of the Austro-Hungarian Empire forbid the payment by Austrian subjects to enemy subjects of any money during the existence of war.

The District Judge, in dismissing the libel, summarized his attitude towards the case as follows:

"From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries forbids a payment by one belligerent subject to his enemy during the continuance of war. This court in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it." *Fol.* 403.

As a consequence of this opinion the libel was ordered dismissed without prejudice, and a decree entered accordingly in the District Court. *Fols.* 404-408.

On appeal to the Circuit Court of Appeals by the libelant, the Circuit Court of Appeals affirmed the decision of the District Court in a *per curiam* opinion, *fols.* 427-431, reading as follows:

"The libelant, a British corporation, supplied coal to the steamers of the respondent, an Austrian corporation, from time to time at Algiers, a French dependency. The master in each case drew a draft for the price of the coal to the order of the libelant payable at London. Of such drafts drawn during the months of May, June and July, 1914, and duly accepted payable in London, the first fell due August 7 and the last October 1. Great Britain declared war upon Austro-Hungary beginning from midnight August 12. Each sovereign prohibited its citizens from paying any debt due an enemy during the continuance of the war. Payment of the drafts was refused by the accepting bank at London.

"The libelant filed a libel *in personam* against the respondent, not upon the drafts, but to recover for the debt, and attached the steamer *Martha Washington*. The respondent does not deny its obligation to pay.

"Judge Veeder in the District Court, feeling that it was inexpedient under these circumstances to take jurisdiction of the controversy, dismissed the libel without prejudice. Whether to take or to decline jurisdiction was a matter within his discretion, see *The Belgenland*, 114 U. S. 355; *Benedict on Admiralty*, Sec. 195, and as no abuse of discretion appears, the decree is affirmed."

There is, therefore, not any question of fact involved in the case, the sole questions to be decided are questions of law.

QUESTIONS OF LAW INVOLVED.

The following questions of law are involved:

1. Whether or not a British subject is entitled to maintain against an Austrian subject in the courts of the United States an action for the purchase price of coals furnished to Austrian steamers plying between Trieste and the United States before the war between Austria and Great Britain was declared, in a case where the Austrian subject has entered a general appearance, admitted the jurisdiction of our Courts, conceded that the claim is just and valid and has placed its sole defense to the payment of the claim on the Austrian prohibition against trading with the enemy.

2. Whether it is a breach of comity for the courts of the United States to exercise jurisdiction in actions between subjects of nations now at war with each other.

3. Whether, when a court has assumed jurisdiction of a case which is within its jurisdiction, it can properly refuse to decide the case in accordance with the admissions contained in the pleadings and proofs and instead of so doing enforce the penal statutes of a foreign country as a defense to a claim which the court finds to be due and payable but for those statutes.

REASONS FOR ADVANCING THE CASE.

The reasons for advancing the case are that, as your petitioner is informed and believes:

1. The case involves questions of gravity, novelty and importance in our general jurisprudence as well as in the domain of private international law.

2. There had not been, before the decision of this case, any reported case in the courts of any nation in which the question of the right of the subject of a belligerent nation to bring suit against the subject of an enemy nation in a neutral court had been raised.

3. There are now pending in several of the District Courts of the United States and in the Courts of several different States many cases involving, as this case does, the question of the right of a subject of a belligerent nation to bring suit against the subject of an enemy nation in a court of a neutral country.

4. Since the decision of the present case, there have been rulings both ways on the question.

In a decision by a Vice Chancellor of the

State of New Jersey, Judge Veeder's decision has been strongly disapproved and solid ground stated for the application of the rule that in such cases neutral courts should grant appropriate relief. *Compagnie Universelle de Telegraphie et de Telephonie Sans Fil v. United States Service Corporation, et al*, 95 Atlantic Reporter 187.

In a case before Judge Rose of the United States District Court for the District of Maryland, Judge Veeder's ruling in the present case was approved, but the case was decided on another point. *Rhederi Actien-Gesellschaft Oceana v. Clutha Shipping Co., Ltd.*, 226 Fed., 339, 343.

In a decision by Judge Haight of the United States District Court for the District of New Jersey, Judge Veeder's ruling has been followed. *The Kaiser Wilhelm II*, 230 Fed., 717.

There are two other cases involving suits by German subjects against British subjects decided by Judge Veeder on the strength of his decision in the present case, in which appeals are now pending awaiting the decision of this Court in the present case.

5. The divergent views expressed by the Equity Court in New Jersey and the United States District Courts indicate that as more cases involving the question in this case come to be decided by the Courts there will be further conflict of opinion.

6. Furthermore, it is certain that more cases of this kind will arise in view of the continuance of the present European war; and, consequently,

to have a pronouncement by this Court as to the proper disposition to be made of suits by a subject of a belligerent nation against a subject of an enemy nation is of such public importance as to justify the advancement of the case for an early hearing on some day convenient to the Court during the present term.

It is submitted, therefore, that it is appropriate that there should be an early hearing of this case by this Court in order that the determination of this case may govern the many cases pending in which the same question has arisen, that conflicting decisions may be avoided and that unnecessary expense to parties litigant may be prevented.

Respectfully submitted,

WATTS, WATTS & COMPANY, LTD.,
Petitioner.

By KIRLIN, WOOLSEY & HICKOX,
Proctors for Petitioner.

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
Counsel for Petitioner.

STATE OF NEW YORK,)
County of New York,) ss.:

JOHN M. WOOLSEY, being duly sworn, says:

I am a member of the firm of Kirlin, Woolsey & Hickox, proctors for the petitioner herein.

I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

The reason why this verification is not made by the petitioner is that it is a foreign corporation, and the reason that it is not made by one

of its officers is that none of them is within the United States.

This application is made in good faith.

JOHN M. WOOLSEY.

Sworn to before me, this {
day of November, 1916.}

CLETUS KEATING,
Notary Public,
New York County No. 33.

I DO HEREBY CERTIFY that I have examined the foregoing petition and that, in my opinion, it is well founded and entitled to the favorable consideration of this Court.

J. PARKER KIRLIN.

UNITED STATES SUPREME COURT

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UNITED STATES SUPREME COURT.

WATTS, WATTS & COMPANY, Limited,
an English corporation,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGAZIONE,
an Austrian corporation,
Respondent.

October
Term, 1916.
No. 503.

SIRS:

PLEASE TAKE NOTICE, that on Monday, November 20, 1916, at the opening of Court on that day, or so soon thereafter as counsel can be heard, we shall make a motion, on the annexed petition, before the Supreme Court of the United States that the above-entitled cause be advanced for hearing on an early day convenient to the Court during the present term, and that we shall then and there ask the Court to grant the petitioner such other or further relief in the premises as may be just.

Yours, &c.,

KIRLIN, WOOLSEY & HICKOX,
Proctors for Petitioner.

HAIGHT, SANDFORD & SMITH, Esqrs.,
Proctors for Respondent.

UNITED STATES SUPREME COURT.

WATTS, WATTS & COMPANY, Limited,
an English corporation,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGAZIONE,
an Austrian corporation,
Respondent.

October
Term, 1916.
No. 503.

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIR-
CUIT.

MOTION BY THE PETITIONER TO ADVANCE.

Now comes Watts, Watts & Company, Ltd., an English corporation, libelant-petitioner, and moves the Court to advance the above-entitled cause for hearing on a day convenient to the Court during the present term.

1. The petitioner, Watts, Watts & Company, Ltd., an English corporation, brought a libel against Unione Austriaca di Navigazione, an Austrian corporation, in the United States District Court for the Eastern District of New York, to recover the sum of \$45,360 the agreed and reasonable price of bunker coals furnished by the libelant to the respondent's steamers at Algiers, a dependency of the French Republic, before the outbreak of present war between England and Austria. *Libel, Fols. 5-11.*

NOV 18 1916

JAMES D. MAHER
CLERK

United States Supreme Court.

OCTOBER TERM, 1916,

No. [REDACTED]

25

WATTS, WATTS & COMPANY, Ltd.,

Libelant-Petitioner,

against

UNIONE AUSTRIACA DI NAVIGAZIONE, etc.,

Respondent.

MEMORANDUM FOR RESPONDENT ON PETI-
TIONER'S MOTION TO ADVANCE.

CHARLES B. HAIGHT,

Counsel for Respondent.



United States Supreme Court.

WATTS, WATTS & COMPANY, LTD.,
Libelant-Petitioner,

against

UNIONE AUSTRIACA DI NAVIGA-
ZIONE, etc.,
Respondent.

October Term,
1916.
No. 503.

Memorandum for Respondent.

ON PETITIONER'S MOTION TO ADVANCE.

1. This case was decided by the United States Circuit Court of Appeals for the Second Circuit on December 14th, 1915, and the mandate from that Court issued on December 24th. The petition asking for the issuance of a writ of certiorari was not presented to this Court until June 5th, 1916, so that a considerable part of the delay in reaching the case for argument cannot be charged to the length of the calendar of this Court.

2. Some confusion may perhaps result from the statement, several times repeated in the motion papers, to the effect that the respondent ad-

mitted the jurisdiction of the District Court, and that that Court assumed jurisdiction, and was, therefore, bound to adjudicate the case. As a matter of fact, the respondent, from the outset, while admitting that the United States District Court *could* take jurisdiction of the case, has consistently urged that it was appropriate for it to refuse to do so. The trial Judge never in fact "assumed jurisdiction" of the case, but simply considered the question as to whether or not it would be wise to do so, and, in his discretion, decided in the negative. The Circuit Court of Appeals, in turn, held that the trial Judge had the right to exercise his discretion as to whether or not jurisdiction should be assumed, and that there was no occasion to set aside his decision after that discretion had been exercised.

3. It is possible, also, that some misapprehension may arise as to the questions of law involved, from the statement appearing in the motion papers at page 6. The question really involved is whether a British subject may, with propriety, be heard in an American Court in an effort to enforce a claim against an Austrian subject on a contract which was made abroad and was to be performed exclusively abroad, when, as proved, it is a criminal offence for the Austrian subject to pay a citizen of Great Britain any sum of money whatever and would equally be a criminal offence for a British subject to pay a citizen of Austria under the same circumstances. The respondent has not conceded that the Petitioner's claim is valid. It does admit that, but for the war and the resulting prohibitions against trading with the enemy, the money would have been paid, but it contends that the war has resulted in a suspension

of the obligation to pay and even of the right to pay.

4. The question as to whether the Courts of this country should be thrown open to the warring nations of Europe is, admittedly, a grave one. If decided in the petitioner's favor it will mean that the Federal Courts will be called upon to adjudicate claims on practically every contract in force between citizens of belligerent countries, when war was declared, provided only jurisdiction can be obtained by attachment. To force a citizen of Great Britain or of Austria to do an act which is prohibited, under a penalty of a heavy fine and imprisonment, would appear to be a delicate operation at best and even aside from that awkward situation it is a serious question whether the Courts of this country will care to undertake a case brought, for instance, on a contract between a citizen of Turkey and a citizen of Russia, which must be decided in accordance with the law of one of those countries, and which may involve questions of trade customs of which we have never heard. Still another embarrassment will be found in the fact that a plaintiff belonging to the Allies will always be able to present a *prima facie* case while all communication with a defendant who is a citizen of the Central Powers will be cut off by Great Britain's censorship.

If this Court considers it appropriate, under all of these circumstances and in view of the Petitioner's own delay, to hasten the ordinary progress of this case, the respondent makes no objection, and merely asks that sufficient time be allowed for counsel to make adequate preparation for the argument. It may not be inappropriate to suggest, however, that there is no occasion for

haste, so far as the respondent is concerned, because of the fact that the *Steamer Martha Washington* was originally attached, and, as the motion papers state, was never released on bonds. As a matter of fact, that steamer is detained within American waters in a most effective manner by the naval forces of Great Britain and will remain here so long as the war lasts, whether the attachment be vacated or not.

It is also open to some question whether the United States District Courts need any direction on the question of law involved, for the purpose of insuring uniformity of decision. Indeed the contrary would appear to be true since, as admitted in the motion papers, every United States judge who has, up to the present time, considered the question, has decided it in the same way, holding that the Federal Courts should not disregard the war conditions and take jurisdiction of a contract such as the present. The only case which suggests a different ruling is that decided by a Vice-Chancellor of the State of New Jersey. (*Compagnie Universille, &c. vs. U. S. Service Corporation*, 95 Atlantic Rep. 187.) That case is readily distinguishable, as it relates to a contract for the transfer of real estate within the boundaries of New Jersey, but, even if that were not true, a pronouncement by this Court would not be binding upon a State Court.

Respectfully submitted,

CHARLES S. HAIGHT,
Counsel for the Respondent.

JAN 25 1918

JAMES D. MAHER,

CLERK OF COURT

1

Supreme Court of the United States

WATTS, WATTS & COMPANY,
LIMITED,
Libelant-Petitioner,

against

UNIONE AUSTRIACA DI NAVI-
GAZIONE,
Respondent.



25

2

MOTION TO ADJOURN HEARING OF CASE.

AND NOW COMES UNIONE AUSTRIACA DI NAVIGAZIONE, by this counsel appearing on its behalf, and moves this Court to adjourn the hearing of the case.

CHARLES S. HAIGHT,
Counsel for Respondent.

3

4 SUPREME COURT OF THE UNITED STATES.

WATTS, WATTS & COMPANY,
LIMITED,
Libelant-Petitioner,

against

UNIONE AUSTRIACA DI NAVI-
GAZIONE,
Respondent.

October Term,
1917.
No. 180.

Sirs:

- 5 PLEASE TAKE NOTICE that the respondent above named in the above-entitled action, on the 28th day of January, 1918, at 12 o'clock noon, or as soon thereafter as counsel can be heard, at the Supreme Court Room in the City of Washington, District of Columbia, will move this Court on the affidavit of Clarence Bishop Smith, Esq., hereto annexed, verified the 23rd day of January, 1918, to have the hearing of this case postponed until such time as may be necessary to enable Charles S. Haight, Esq., the counsel for the respondent, who has suddenly been called to Europe, to argue the cause on his return.

Together with this motion the respondent serves upon the appellant a copy of the affidavit of Clarence Bishop Smith, Esq., above referred to.

- 6 Dated, New York, January 23, 1918.

CHARLES S. HAIGHT,
Counsel for Respondent.

To:

MESSRS. J. PARKER KIRLIN,
JOHN M. WOOLSEY,
CLETUS KEATING,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES. 7

WATTS, WATTS & COMPANY,
LIMITED,
Libelant-Petitioner,

against

UNIONE AUSTRIACA DI NAVI-
GAZIONE,
Respondent.

SOUTHERN DISTRICT OF NEW YORK, SS. :

8

CLARENCE BISHOP SMITH, being duly sworn, deposes and says:

I am a partner of Charles S. Haight, of counsel for the respondent herein. The above case is No. 180 on the calendar of this court and may be reached for argument in the week beginning January 28, 1918. This cause was tried in the District Court by Lorenzo Ullo, who has since deceased, and since that time the conduct of the case on behalf of the respondent has been entirely in the hands of Charles S. Haight, Esq., of New York City, its counsel. At the close of last week said Charles S. Haight suddenly learned that it would be necessary for him to make an immediate trip to Europe, and he will sail on January 24, 1918. His return trip is expected to be in about sixty days. For someone else to prepare the brief and argue the case would entail great labor and would be a hardship upon our client.

9

A page proof of the appellant's brief was served upon the said Charles S. Haight on January 18th, but the brief itself has not yet been served, as re-

- 10 quired by the Supreme Court Rules. No brief has been prepared on behalf of the respondent.

This case has been pending since August 25, 1914, and the Respondent-Petitioner would suffer no material injury from such an adjournment.

CLARENCE BISHOP SMITH.

Sworn to before me this
23rd day of January, 1918.

BRENT W. BLYTHE,
Notary Public,
New York County, 175.

11

[13301]

12

JAN 28 1918

JAMES D. MAHER,

CLERK.

1

SUPREME COURT OF THE UNITED STATES.

WATTS, WATTS & COMPANY, LTD.,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGAZIONE, ETC.,
Respondent.

October Term
1917
No. 139

25

Opposition to
Motion to
Adjourn Hearing
of Case.

2

And now comes Watts, Watts & Company, Ltd., by its counsel appearing on its behalf, and opposes the motion made by counsel for the respondent to adjourn the hearing of this case for sixty days.

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
CLETUS KEATING,
Counsel for Libelant-Petitioner.

3

4 SUPREME COURT OF THE UNITED STATES.

WATTS, WATTS & COMPANY, LTD.,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGAZIONE, ETC.,
Respondent.

October Term
1917
No. 180.

Affidavit in
Opposition to
Motion to
Adjourn Hearing
of Case.

5 STATE OF NEW YORK,
County of New York, } ss.:
Southern District of New York.

JOHN M. WOOLSEY, being duly sworn, says:

1. I am one of the counsel for the libelant-petitioner herein.

2. The Writ of Certiorari under which this case is now in this Court was granted herein on June 12, 1916. 241 U. S. 677.

6 3. The case appeared on the docket of this Court for the October Term 1916 as No. 503.

4. On November 30, 1916, we made a motion to advance this cause which was opposed by respondent and denied.

5. On January 15, 1916, we made a motion to transfer this cause to the summary docket which was opposed by the respondent and denied.

6. The case was duly docketed on the October 1917 docket of this Court as No. 180, and I am informed by the

Clerk that it may be on the calendar during the week 7
beginning January 28, 1918, and that there is a possibility
of its being reached during this week.

7. The firm of which I am a partner is engaged in the
practice of maritime law and has been extremely busy
during the past year and we have lost from our office
force nine out of fourteen members who have gone into
Government service, including three partners, and have
only been able to secure four lawyers as substitutes for
those whom we have lost. Consequently, we have been
exceedingly shorthanded and it has been very difficult to 8
prepare briefs and other Court papers as promptly as
they would have been prepared if we had not been crip-
pled by the absence of so many of our staff.

8. On Thursday, January 17, 1918, we served on coun-
sel for the respondent a proof of our brief in this Court
and advised them that we would furnish them with page
proof and then with the final printed brief very prompt-
ly, but the order of the Fuel Administration shut down
our printer so that we were unable to secure further
proof until Thursday, the 24th of January when we
served page proof on the office of counsel for the re- 9
spondent.

9. We are serving a copy of the final printed brief on
counsel for the respondent today and are mailing copies
to the Clerk today and they will be on file when this
motion comes on to be heard.

10. On Friday, January 18, 1918, Mr. Clarence Bishop
Smith, one of the partners of Mr. Charles S. Haight,
counsel for the respondent, stated to your deponent that

- 10 Mr. Charles S. Haight was going abroad and desired to have the case adjourned pending his return.

11 11. After consideration your deponent advised Mr. Smith on Saturday morning, January 19th, that we could not consent to an adjournment of the case in view of the international situation, because the case was a suit by an English company against an Austrian company, and because our client's instructions were to press the case for argument at the earliest possible date in view of the long delay which necessarily has occurred before the case could be reached in regular order on the calendar of this Court.

12 12. On January 23, 1918, we were served by Mr. Smith with a typewritten copy of the motion to adjourn the case, which is now submitted in printed form to the Court, and, at the same time, Mr. Smith handed to your deponent a copy of a letter addressed by Mr. Charles S. Haight to the Chief Justice, in which Mr. Haight stated that he had to proceed immediately to the other side and, without disclosing the nature of his errand, hinted at the importance of his trip to the Government because it involved an emergency matter in which the United States Shipping Board was seriously interested. He referred to a copy of a letter from Mr. Frank L. Polk, Acting Secretary of State, addressed to the firm of Haight, Sandford & Smith, which was enclosed with his letter to the Chief Justice. This letter was also handed to your deponent. Mr. Polk states [*Italics ours*]:

“Mr. Haight is *not acting as a representative of this government* but he has been advised by this Department and by the United States Shipping

Board that it is exceedingly desirable that he make the trip at this time." 13

13. Your deponent understands that Mr. Haight's contemplated trip merely involves a question of negotiations between Norwegian clients, for whom he is acting, and the United States Shipping Board, and respectfully submits that his leaving for this purpose is not any reason why the argument of this case should be delayed to the prejudice of the petitioner for sixty days, as is asked by the motion for adjournment.

14. Mr. Haight has eight partners experienced in maritime matters. Only one of them is absent in Government Service. 14

15. The record in the case consists of only 112 pages, the facts are stipulated, and the liability is admitted, except for the question as to the right of an English libellant to pursue an Austrian respondent in our Courts during a period when there is war between England and Austria.

16. As can be seen by the report of this case in the Circuit Court of Appeals for the Second Circuit, *Watts, Watts & Co. Ltd. vs. Unione Austriaca di Navigazione*, 229 Fed. 136, Mr. Clarence Bishop Smith, who makes the affidavit in support of the motion for adjournment, was of counsel with Mr. Haight and your deponent is informed and believes that Mr. Smith participated in the writing of the brief on which the case was argued in the Circuit Court of Appeals, is thoroughly conversant therewith, and is thoroughly capable of arguing this appeal. 15

16 17. Your deponent is informed that this Court adjourns on February 4th and will not sit to hear arguments again until March 4th, and if this case is not reached during the week beginning January 28 the respondent's counsel will have had the petitioner's brief for a longer time, prior to the argument than is required by the rules of this Court. There would, therefore, not be any reason under the rules of this Court or the special circumstances of this case, why this case should not be argued when reached.

17 WHEREFORE, your deponent respectfully requests that this case be allowed to hold its place on the calendar so that it can be reached for argument during the month of March.

JOHN M. WOOLSEY.

Sworn to before me this)
25th day of January, 1918.)

RANDOLPH HARRIS,
Notary Public, New York Co.,
No. 335.

Office Supreme Court, U. S.
FILED

MAR 11 1918

JAMES D. MAHER,
CLERK.

12-
SUPREME COURT OF THE UNITED STATES.

WATTS, WATTS & COMPANY, LTD.,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGA-
ZIONE, etc.,
Respondent.

October Term
1917.

No. 1

25

Motion to Restore
Case to Docket

2

And now comes Watts, Watts & Company, Ltd., libelant-petitioner, by its counsel, appearing on its behalf, and moves this Court that the above entitled case be restored to the day call of the docket of the Supreme Court of the United States for March 12, 1918.

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
CLETUS KEATING,
Counsel for Libelant-Petitioner.

3

4 SUPREME COURT OF THE UNITED STATES.

WATTS, WATTS & COMPANY, LTD.,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGA-
ZIONE, etc.,
Respondent.

October Term
1917.
No. 180.

Notice of Motion to
Restore Case to
Docket.

5

SIR.—PLEASE TAKE NOTICE that the libelant-petitioner, Watts, Watts & Company, Ltd., by its counsel, appearing in its behalf, on the 11th day of March, 1918, at 12 o'clock noon or so soon thereafter as counsel can be heard, will move at the Supreme Court Room in the Capitol in the City of Washington, District of Columbia, on the affidavit of John M. Woolsey, hereto annexed, verified the second day of March, 1918, to have this case restored to the day call of the docket of the Supreme Court of the United States for March 12, 1918, and will then and there ask the court for such other and further relief as may be just in the premises.

6

Together with this motion, the libelant-petitioner 7
 serves on the respondent a copy of the affidavit of John
 M. Woolsey, above referred to.

J. PARKER KIRLIN,
 JOHN M. WOOLSEY,
 CLETUS KEATING,
 Counsel for Libelant-Petitioner.

To:

CHARLES S. HAIGHT, Esq.,
 CLARENCE B. SMITH, Esq.,
 Counsel for Respondent.

8

MESSRS. HAIGHT, SANDFORD & SMITH,
 Proctors for Respondent.

9

10 SUPREME COURT OF THE UNITED STATES.

WATTS, WATTS & COMPANY, LTD.,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGA-
ZIONE, etc.,
Respondent.

October Term
1917.
No. 180.

Motion to Restore
Case to Docket

11

STATE OF NEW YORK,
County of New York,
Southern District of New York, } ss.:

JOHN M. WOOLSEY, being duly sworn, deposes and
says:

1. I am one of the counsel for the libelant-petitioner
herein.

12

2. The Writ of Certiorari under which this case is
now in this Court was granted herein on June 12, 1916,
241 U. S. 677.

3. The case appeared on the docket of this Court for
the October Term 1916 as No. 503.

4. On November 30, 1916, we made a motion to ad-
vance this cause which was opposed by respondent and
denied.

5. On January 15, 1916, we made a motion to transfer this cause to the summary docket which was opposed by the respondent and denied. 13

6. The case was, thereafter, duly docketed on the October, 1917, docket of this Court as No. 180, and would have been reached for argument during the week beginning January 28, 1918, if application had not been made to this Court on behalf of the respondent for an adjournment of the hearing of the case.

7. On January 25, 1918, we served the necessary number of copies of the final printed brief in behalf of the libelant-petitioner in this case on counsel for the respondent and mailed the necessary number of copies thereof to the Clerk of this Court. I am informed and believe that the briefs for the libelant-petitioner are now on file with the Clerk of this Court and have been on file since January 26, 1918, for my firm received a letter under that date from the Clerk of this Court advising us that the briefs had been received and filed. 14

8. On January 29, 1918, your deponent was advised by Mr. Charles Henry Butler, who presented an affidavit in behalf of counsel for the libelant-petitioner in opposition to the motion to adjourn, that the motion had been granted to the extent of passing the case temporarily under the 26th Rule but that the Court had stated that if there were any undue delay by reason of Mr. Haight being absent, the respondent would have to arrange to have other counsel argue the case. 15

- 16 9. Accordingly, on January 29, we addressed and delivered a letter to Messrs. Haight, Sandford & Smith, the proctors for the respondent, a copy of which is hereto annexed, marked Exhibit A.

10. On February 28, 1918, we addressed and delivered a letter to Messrs. Haight, Sandford & Smith, a copy of which is hereto annexed, marked Exhibit B, and with that letter submitted for signature by counsel for the respondent a stipulation signed by counsel for the libelant-petitioner in the form hereto annexed, marked Exhibit C.

- 17 11. On delivery of the aforesaid letter of February 28, 1918, Mr. Clarence Bishop Smith, a member of the firm of Haight, Sandford & Smith, to whom the letter of February 28th, 1918, Exhibit B hereof, was handed, by your deponent's representative, stated that Mr. Haight was still abroad and that counsel for the respondent were unwilling to sign the stipulation, Exhibit C hereof, submitted to them for signature, whereby the case was to be restored by consent to the day call of the docket of this court for March 11, 1918.

- 18 12. Your deponent is advised and believes that it is still uncertain when Mr. Charles S. Haight will return from Europe but, inasmuch as respondent's attorneys have had the brief of the libelant-petitioner in this case in their hands since January 25, 1918, they have had ample time in which to prepare a reply brief and to arrange for the argument of the case by other counsel than Mr. Haight.

13. The record in this case consists of only one hundred and twelve (112) pages; the facts are stipulated and the liability is admitted except as to the question of the right of an English libellant to sue an Austrian respondent in our Admiralty courts during a period when there is a war between England and Austria. 19

14. As can be seen by the report of this case in the Circuit Court of Appeals for the Second Circuit, *Watts, Watts & Company, Ltd., against Unione Austriaca di Navigazione, etc.*, 229 Fed. 136, Mr. Clarence Bishop Smith, who made affidavit on the motion made on January 28, 1918, on behalf of the respondent for an adjournment of the case, was of counsel with Mr. Charles S. Haight in the Circuit Court of Appeals and deponent is informed and believes that Mr. Clarence Bishop Smith participated with Mr. Haight in writing the brief on which the case was argued in the Circuit Court of Appeals and is thoroughly familiar with the litigation and thoroughly capable of arguing the appeal in this court. 20

15. If Mr. Smith for any reason cannot make the argument there are other members of the firm of Haight, Sandford & Smith who can do so. 21

16. Your deponent is informed that the addition of this case to the day call for March 12, 1918, would not involve its being reached for argument for some time thereafter.

17. It would be a great hardship to libellant-petitioner if the case should not be argued during the present

- 22 term of this Court and your deponent is informed and believes that if there is a delay in the restoration of the case to the docket there is danger that the case will not be argued during the present term.

WHEREFORE, your deponent respectfully requests that this case be restored to the day call of the docket of this court for March 12, 1918, and that the respondent be required to arrange to argue the case when reached, and that the libelant-petitioner shall have such other and further relief as may be just in the premises.

23

JOHN M. WOOLSEY.

Sworn to before me this
2nd day of March, 1918.

HARRY D. THIRKIELD,

Notary Public,

New York County, No. 43.

24

EXHIBIT A.

25

January 29, 1918.

MESSRS. HAIGHT, SANDFORD & SMITH,

27 William Street,

New York, N. Y.

Attention of Mr. CLARENCE BISHOP SMITH,

Watts, Watts & Company *vs.* Unione

Austriaca di Navigazione

DEAR SIRs:

We hand you herewith five copies of the affidavit we filed yesterday in the Supreme Court in opposition to the motion to adjourn.

26

We are advised by Mr. Charles Henry Butler, who represented us on the motion, that as soon as he stated we opposed the motion the Chief Justice said he had knowledge of the matter, and, in view of the situation, he would not adjourn the case, but would pass it temporarily under the 26th Rule, so that, in case there was any undue delay by reason of Mr. Haight's absence, the respondent should arrange to have other counsel to argue the case.

The rule referred to by the Chief Justice is subdivision 9 of Rule 26, which reads as follows:

27

"If, after a case has been passed, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may

- 28 move to take up the case, and it shall then be assigned to such place upon the docket as the Court may direct."

We hereby notify you that unless you are willing to stipulate, prior to the 1st of March, that the case may be restored to the calendar for a day certain during the week beginning March 4, 1918, we shall move the Court under Rule 26 to have the case assigned to such place on the docket as the Court may direct.

- 29 For your information, we have to advise you that Mr. Butler tells us that, owing to the number of cases specially assigned for March 4th, agreement for restoration could not bring the Watts case up for hearing before the latter part of March.

Very truly yours,

KIRLIN, WOOLSEY & HICKOX.

JMW:W

Encl.

EXHIBIT B.

31

February 28, 1918.

MESSRS. HAIGHT, SANDFORD & SMITH,
27 William Street,
New York, N. Y.

Attention of Mr. CLARENCE BISHOP SMITH,
Watts, Watts & Company *vs.* Unione
Austriaca di Navigazione, etc.

DEAR SIRs:

We refer you to our letter of January 29th, 1918, in which we advised you that unless you were willing to stipulate, prior to the 1st of March, that the case should be restored to the calendar of the Supreme Court for a day certain during the week of March 4th, we should move the Court under Rule 26 to have the case assigned to such place on the docket as the Court might direct.

32

We have accordingly prepared a stipulation for the restoration of the case to the calendar and instead of asking to have it restored for the week of March 4, 1918, we have provided for its restoration on March 11, 1918, thus giving you a week's leeway beyond our previous suggestion.

33

Will you kindly advise us by the bearer of this letter, Mr. Thirkield of our office, whether you are willing to sign the enclosed stipulation?

We are sending you the original and two copies. The original for the Clerk, if you are willing to sign it, and the two copies; one for your files and the other to be signed by you for our files.

- 34 If you are unwilling to sign this stipulation, will you kindly return it by bearer and we will have to make a notice of motion for March 11, 1918, for the restoration of the case to the calendar under Rule 26.

Very truly yours,

KIRLIN, WOOLSEY & HICKOX.

JMW:W

Encls.

35

36

EXHIBIT C.

37

SUPREME COURT OF THE UNITED STATES.

WATTS, WATTS & COMPANY, LTD.,
Libelant-Petitioner,

AGAINST

UNIONE AUSTRIACA DI NAVIGA-
ZIONE, etc.,
Respondent.

October Term
1917.
No. 180.
—

38

SIR.—IT IS HEREBY STIPULATED by and between counsel for the respective parties thereto that the above-entitled case be restored to the day call of the docket of the Supreme Court of the United States for March 11th, 1918.

Dated, New York, February 28, 1918.

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
CLETUS KEATING,
Counsel for Libelant-Petitioner.

39

.....,
Counsel for Respondent.

To:

JAMES D. MAHER, ESQ.,
Clerk.



Office Supreme Court, U. S.
FILED

MAR 11 1918

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

WATTS, WATTS & COMPANY, LTD.,
Libelant-Petitioner,

against

UNIONE AUSTRIACA DI NAVIGA-
ZIONE, etc.,

Respondent.

October Term.

191
No.

25

Opposition to
Motion to
Restore Case
to Docket.

2

And now comes Unione Austriaca di Navigazione, respondent, by its counsel appearing on its behalf, and opposes the motion made by counsel for the libelant-petitioner to restore the above-entitled case to the day call of the docket of the Supreme Court of the United States for March 12, 1918.

CHARLES S. HAIGHT,
JOHN W. GRIFFIN,
L. RUSSELL ALDEN,
Counsel for Respondent.

3

4 SUPREME COURT OF THE UNITED STATES.

WATTS, WATTS & COMPANY, LTD.,
Libelant-Petitioner,

against

UNIONE AUSTRIACA DI NAVIGA-
ZIONE, etc.,
Respondent.

October Term,
1917.
No. 180.

Affidavit in
Opposition to
Motion to
Restore Case
to Docket.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:
SOUTHERN DISTRICT OF NEW YORK, }

5 CLARENCE BISHOP SMITH, being duly sworn, deposes and says:

1. I am a partner of Mr. Charles S. Haight, counsel for the respondent herein.

2. The case is number 180 on the docket of this Court.

3. Mr. Haight suddenly learned in the latter part of January that it would be necessary for him to make an immediate trip to Europe, his return trip being expected in about sixty days, from the day when he sailed, January 24th, 1918.

6 4. The brief of the libelant-petitioner was served on respondent's attorneys on January 25, 1918, after Mr. Haight's departure and was docketed shortly thereafter.

5. The respondent fearing that the case might be reached for argument in the week beginning January 29, 1918, moved this Court to pass or continue the case in order to enable Mr. Haight to argue it, stating in the moving affidavit that Mr.

Haight was expected to start back about sixty days 7
from January 24th, 1918.

6. Mr. Haight has the entire charge of the case and prepared the brief in opposition to the writ of certiorari. It would entail great labor and be a hardship upon our client to have someone else in our office prepare the brief and argue the case. At the present time one partner is serving in the United States Army and four clerks are in the army or connected with United States War Service, so that the office finds it difficult to re-duplicate work.

7. At the time of Mr. Haight's departure, the nature of his trip was called to the attention of this 8
Court by a letter from the Acting Secretary of State.

8. The exact date of Mr. Haight's return has not been learned, but it is still expected that he will sail on or about March 24th, sixty days from the time of his departure, in which case he will be here before April 15th, for which date the case could safely be restored to the docket.

WHEREFORE, deponent respectfully requests that the motion to restore this case to the day call docket of this Court for March 12th, 1918, be denied.

CLARENCE BISHOP SMITH.

Sworn to before me this 9
7th day of March, 1918.

BENJAMIN H. TRASK,
Notary Public, N. Y. Co.
(Seal)